

INTERNATIONAL TRADE AND CARRIAGE OF GOODS

EDITED BY
BARIŞ SOYER
AND
ANDREW TETTENBORN

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informa law
from Routledge

First edition published 2017
by Informa Law from Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Informa Law from Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data

A catalog record for this book has been requested

ISBN: 978-1-138-18456-5 (hbk)

ISBN: 978-1-315-64492-9 (ebk)

Typeset in Plantin
by Apex CoVantage, LLC

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Professor Dr Nikaki joined Swansea in 2005 as a lecturer and has been an associate professor since 2013. Having graduated with distinction from Aristotle University, Thessaloniki and having worked in private practice, she obtained an LLM from Tulane in 2001 with distinction and later undertook a PhD degree in carriage by sea. Her principal research interest is carriage of goods by sea, but her interests extend to private international law and multimodal transport. She has held a visiting fellowship position at the Institute of Advanced Legal Studies (IALS) and the Scandinavian Institute of Maritime Law in Oslo. She has published in top journals including the *Journal of Air Law and Commerce*, the *Journal of Business Law*, the *Journal of Maritime Law and Commerce*, the *Berkeley Journal of International Law* and the *Tulane Maritime Law Journal*.

Professor Dr Nikaki's teaching has covered an impressively wide area, ranging from carriage by sea, land and air, charterparties, commercial law, e-commerce and international trade to international litigation, oil and gas law and private international law. She is also part of the team that delivers the professional courses offered by the Institute of International Shipping and Trade Law.

Simon RAINEY QC

Barrister

Quadrant Chambers, London

Simon Rainey QC is a barrister at, and former joint head of, Quadrant Chambers. He has been in practice since 1983 and took silk in 2000; he is also a Recorder and sits as a deputy High Court judge. In shipping work, he is regarded as one of the top leaders, being placed in the first division of shipping silks by both Chambers and the Legal 500. He specialises in all aspects of dry shipping and charterparty disputes, with particular emphasis in recent years on heavy shipbuilding disputes (from oil rigs and dry cargo vessels to car-carriers and superyachts); in addition, he has handled complex cases arising out of dangerous cargo incidents and safe port disputes, representing variously owners and charterers. He was counsel for the successful buyer on the high-profile arbitration appeal in *The Union Power* [2013] 1 Lloyd's Rep 325 on the application of the implied warranties to the Norwegian Saleform 1993. He also regularly sits as an arbitrator in LMAA, ICC, LCIA and UNCITRAL arbitrations and is a Fellow of the Chartered Institute of Arbitrators.

In addition, Simon Rainey is an author, having written *Tug and Tow and Offshore Contracts* (2011), the leading text on offshore industry contracts. This reflects the fact that he is frequently involved in advisory work and litigation on all aspects of offshore marine and construction and energy and natural resource disputes.

He has been a visiting research fellow at the Institute of International Shipping and Trade Law, University of Swansea since 2010 and was appointed Honorary Professor of Business, Law and Economics, University of Swansea in 2013.

Stuart SHEPHERD

Partner and Global Head of Trade
Ince & Co LLP, London

Stuart Shepherd joined Ince & Co as a trainee in 1982 and became a partner in 1990. He has specialised in shipping and commodity trading throughout his career, acting for traders in various industries from oil and gas to commodities traded on GAFTA and FOSFA terms. Sources say he is ‘fantastic’ (Chambers 2011) and ‘extremely experienced and immensely practical, and understands the legal and commercial dynamics of any dispute’ (Chambers 2012). A recent Legal 500 says that he is ‘one of the best physical commodity lawyers around, and a delight to work with – he knows the commercial realities of any deal inside out’.

Frank STEVENS

Senior Associate
Roosendaal Keyzer Advocaten, Antwerp

Frank Stevens obtained his degree from the University of Louvain in 1991, and also holds an LLM in Admiralty from Tulane (1992) and a ‘Special Degree in Maritime Sciences’ from Antwerp (1993). He joined the Antwerp bar in 1993, and has been practising transport and maritime law since then. He is currently a Senior Associate with Roosendaal Keyzer, one of the leading maritime law firms in Antwerp.

Frank Stevens is the author of textbooks on carriage of goods by sea and on limitation of liability. He is a part-time Lecturer at the Erasmus University Rotterdam, regularly publishes and speaks on issues of transport and maritime law, and is on the Board of Editors of three legal journals.

Professor Michael F. STURLEY

Chair in Law
University of Texas

Michael F. Sturley is the Fannie Coplin Regents Chair in Law at the University of Texas Law School. He received his undergraduate education at Yale, and has law degrees from there and Oxford. He has served as the Rapporteur for the CMI’s International Sub-Committee on Issues of Transport Law, as the Senior Advisor on the US Delegation to Working Group III (Transport Law) of the UN Commission on International Trade Law (UNCITRAL), and as a member of the UNCITRAL Experts’ Group on Transport Law.

Professor Sturley has written extensively on maritime subjects, has lectured on maritime subjects at law schools and conferences around the world, and has been

consulted in maritime cases before the US Supreme Court, in many lower federal courts and in foreign courts.

Before becoming an academic, Professor Sturley was associated with Sullivan & Cromwell in New York and clerked for judges in the US Supreme Court and the Second Circuit Court of Appeals in New York.

Professor Richard WILLIAMS

Professor in Law

Institute of International Shipping and Trade Law

Swansea University

Richard Williams retired from private practice at Ince & Co at the end of 2000 after 30 years, 25 as a partner. He was chair of the firm's dry shipping business group. Having grown up in South Wales, Professor Williams has been a Visiting Professor at Swansea University since then and teaches the law relating to charterparties and the carriage of goods by sea, land and air on the LLM course. Throughout his career he has been involved not only in the litigation of cases to the highest courts of appeal in the UK and abroad but also in the development of policy and documentation within the industry both for clients and international industry bodies. He has been consulted by United Nations agencies and other international bodies such as BIMCO and the International Group of P&I Clubs in relation to industry-wide issues and the drafting of standard documents, and is currently a member of the working group established by the UK Department for Transport to consider the implications of the implementation of the Rotterdam Rules into the law of the UK.

He is the author of numerous papers and articles on shipping law, is co-author of the textbook *Limitation of Liability of Maritime Claims* (4th edition 2005) and author of the *Gard Guidance to the Statutes and Rules* (2008), the *Gard Guidance on Maritime Claims and Insurance* (2013) and the *Gard Guidance to the Rules* (2015).

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FOREWORD

The regular Swansea autumn colloquium on shipping and commercial law has become a firm fixture in the commercial law calendar. Held every year at Swansea University under the auspices of the Institute of International Shipping and Trade Law, it represents an opportunity for academics and practitioners to exchange ideas on contemporary topics in international trade law and even for the occasional commercial judge to obtain some advance notice of the likely issues with which they will soon have to grapple. The summer of 2015 saw the eleventh such event. It proved to be an international colloquium in the true sense – international in perspective, with contributions from distinguished scholars from a range of jurisdictions and backgrounds, covering such diverse topics as paperless trade, the Rotterdam Rules, Islamic letters of credit and consignees’ rights under a variety of European legal systems; and a forum for questions and discussions in which the ideas presented could be tested and refined. This book is the fruit of those discussions. For those who were unable to experience themselves the late summer sunshine of Swansea Bay and the warm welcome of the Institute, and even for those who were fortunate enough to do so, it provides a rich source of learning and experience covering the whole range of international trade law – sale of goods, carriage, banking and insurance, the interlocking contracts which are in play when business people need to trade cargoes across the oceans of the world. It will be a valuable resource. I commend it to the reader.

The Hon Mr Justice Males
Presiding Judge of the North Eastern Circuit
London, February 2016

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PREFACE

Rather like the background to an Ealing Studios movie, a curious air of England in the 1950s still hangs like a London fog over much writing on the law of carriage and international sales. Swansea University's Institute of International Shipping and Trade Law makes no bones of its aim to break this mould. From its beginnings in 2000 it has made a special point of presenting commercial law in all its disorderly contemporaneity. The present volume, product of the School's eleventh annual commercial law colloquium held in September 2015, is no exception. Its theme could not be simpler: the law affecting carriage and sales of goods sold in international trade. The first part deals with the sometimes uneasy relations between these two. It covers such matters as what kind of contract a seller has to conclude if they agree to arrange delivery (Ruth Hosking), to the clash between environmentalism and impatience implicit in demands for slow steaming (Theodora Nikaki) and the often incongruous spatchcocking of demurrage stipulations into sales agreements (Simon Baughen). The second section continues the theme with chapters on consignees' rights in civil-law Europe and under the Rotterdam proposals (Frank Stevens and Michael F. Sturley), the ever-changing problems associated with letters of indemnity (Richard Williams), paperless trade (M. A. Goldby) and the perennial difficulties of less-than-frank 'said to contain' clauses (Olivier Cachard). There follows some serious stuff on letters of credit in connection with sanctions (Damian Honey and Michael Buffham), the demands of Islamic propriety (Jason Chuah) and rejection of goods (Stuart Shepherd), and also on lending against non-title documents (Andrew Tettenborn). Rounding off the work is a section on some insurance bugbears: open covers (Peter MacDonald Eggers QC), transit clauses (Sarah Cockerill QC) and the much-awaited Insurance Act 2015 on cargo insurance (Barış Soyer).

We are, as ever, enormously grateful to Informa Law (from Routledge) for their continuing generous support for the Institute of International Shipping and Trade Law, and more generally for commercial law at Swansea. Not only have they made our job as editors as painless as any such task can ever be: more to the point, neither this book nor the colloquium underlying it would have happened without them. We are also grateful to our colleagues at the

PREFACE

Institute and those who attended last year's colloquium either as speakers, chairpersons or delegates. They have all in their own way contributed to the success of this book.

Bariş Soyer
Andrew Tettenborn
February 2016
Swansea, Wales

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PART 1

CONTEMPORARY ISSUES IN
INTERNATIONAL SALE CONTRACTS

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CHAPTER 1

What is a reasonable contract of carriage for CIF/CIP purposes? – section 32(2) of the Sale of Goods Act 1979

*Ruth Hosking**

1.1 Introduction

Section 32(2) of the Sale of Goods Act 1979 sets out a seller's duty to make a reasonable contract of carriage for the goods being sold. This provision is, as one commentator eloquently put it, 'little known and seldom applied'.¹ It has attracted very little judicial consideration and hardly any academic commentary. This chapter seeks to examine the provision, including its legislative and case law history, and consider the extent to which it might be capable of being successfully used by buyers.

1.2 The statutory framework

Section 32(1) of the Act provides:

Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be delivery of the goods to the buyer.

Section 32(2) of the Act then provides, with reference to the cases contemplated by subsection (1),² that:

Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in the course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.

Under both classic CIF and CIP contracts, the sellers are required to send the goods to the buyer and are contractually bound to make a contract of carriage. However, the provisions of s. 32(2) apply even where the seller is not contractually

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¹ See F. Lorenzon, 'When is a CIF seller's carriage contract unreasonable? – section 32(2) of the Sale of Goods Act 1979' (2007) 13 JIML 241. See also chapter 2 in *Sassoon on CIF & FOB Contracts* (5th edn, Sweet & Maxwell, 2012), Ch 2.

² See *Wimble Sons & Co v Rosenberg* [1913] 3 KB 743.

required to make a contract of carriage – where it is merely ‘authorised’ but not ‘required’ to send the goods to the buyer.³

1.3 The legislative history of the provision

Section 32(2) of the Act is identical to the same provision in the Sale of Goods Act 1893. That Act⁴ was itself a codifying Act in that it drew on established common law principles: see for example the pre-Act case of *Clarke v Hutchins*⁵ where it was decided that it was the duty of the seller ‘to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance, as that in case of a loss the [buyer] might have his indemnity against the carrier’.⁶

More than seven decades later, in 1885, in *Pointin v Porrier*⁷ the court applied the seller’s duty as set out in *Clarke v Hutchins*,⁸ albeit using a slightly different formulation, namely that the seller ‘must take reasonable precautions to insure safe delivery, and if it does not, and in the case of the loss the defendant has no indemnity against the carrier, it cannot be said to have been a proper delivery’.

In 1888 Sir Mackenzie Chalmers produced the first draft of the Sale of Goods Bill. Clause 40(2) of that Bill included a provision that ‘In order that delivery to a carrier may operate as delivery to the buyer, the seller must entrust the goods to the carrier on such terms as may be usual for making the carrier responsible to the buyer for the safe custody and carriage of the goods.’ The language of ‘usual terms’ was amended to ‘reasonable steps’⁹ in the 1890 Bill and further amended to ‘reasonable terms’ in the 1892 version of the Bill. The other, and arguably more important, change between the draft Bill and the 1893 Act was that the reference to ensuring the carrier’s responsibility for the safekeeping of the goods was deleted and a duty to conclude a reasonable contract of carriage put in its place. Which leaves the question: what is a reasonable contract of carriage?

1.4 The reasonableness test

The question of reasonableness is to be determined by the circumstances prevailing at the time of performance, namely the time when the goods are shipped and not when the contract was made: *Tsakiroglou & Co Ltd v Noble Thorl GmbH*.¹⁰ It is a

³ *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell, 2014), §18–289. See also *Houlder Bros & Co Ltd v Public Works Commissioner* [1908] AC 276 (PC), at 290 (Atkinson LJ) (decided under the SGA 1893). cf. Article 32(2) of the Vienna Convention on Contracts for the International Sale of Goods which provides ‘If the seller is bound to arrange for carriage of goods . . .’ (emphasis added).

⁴ On the history of the Act see the Introduction to M. Chalmers, *The Sale of Goods Act 1893, including the Factors Acts, 1889 & 1890* (2nd edn, Clowes & Sons, 1894).

⁵ (1811) 14 East 475.

⁶ At 476, per Lord Ellenborough.

⁷ (1885) 49 JP 199.

⁸ Note 5 above.

⁹ Clause 35(2) of the 1890 Bill.

¹⁰ [1962] AC 93, at 132 (Lord Guest).

question of fact in each case whether a contract is reasonable in accordance with s. 32(2) of the Act: see *The Rio Sun*.¹¹

English lawyers are familiar with other statutory provisions which include a reasonableness test, the best known of which is s. 11 of the Unfair Contract Terms Act 1977. However, the reasonableness test in s. 32(2) of the Act is not expressly set out in the Act and appears (on the basis of the little case law available) to involve three steps or stages: (1) the contract must be on usual terms; (2) the contract must be appropriate to grant sufficient protection to the goods while in transit; and (3) the contract must give the buyer protective rights against the carrier.¹²

1.4.1 Contract on usual terms

The terms of the contract of carriage must be usual for the trade concerned. What is usual in the trade is to be considered ‘mercantilely reasonable’.¹³ Other cases have referred to this duty as being a duty to procure a contract of carriage which is ‘reasonable and usual’¹⁴ or one which does not contain ‘unreasonable or unusual’ terms.¹⁵ As Rix J said in *The Northern Progress*:¹⁶

A proper contract of affreightment or bill of lading is one which will inter alia provide for the carriage of the goods to the contractual destination, contain no deviation clauses other than those which are usual and customary, and generally be in a form which is ‘reasonable and acceptable in the trade’ or ‘usual and customary’ . . . These duties are reflected in s. 32(2) of the Sale of Goods Act 1979.

In *Finnish Cellulose Union v Westfield Paper Co Ltd*¹⁷ the court had to determine whether the inclusion of an FAA Current War Risk Clause contained in a contract of carriage was usual. In doing so, Lord Caldecote reviewed carriage contracts in the trade in question and found on the evidence that in the trade, the identical clause, or one like it, had been widely used since the outbreak of the Second World War and that save for this case and in the case of one other shipment, no question had been raised concerning the clause. He opined that he would have expected ‘some objection to have been taken to the clause, if it was so unusual or unreasonable as to make a bill of lading containing it defective as a shipping document, under a c.i.f. contract’.¹⁸

11 *Gatol International Inc. v Tradax Petroleum Ltd (The Rio Sun)* [1985] 1 Lloyd’s Rep. 350, at 360 (Bingham J).

12 *Sassoon on CIF & FOB Contracts*, note 1 above, at §2–025.

13 *Sanders Bros v Maclean & Co* (1883) 11 QBD 327, at 337 (Brett MR).

14 *Finnish Cellulose Union v Westfield Paper Co Ltd* (1940) 68 Ll. L Rep. 75, at 81 (Lord Caldecote).

15 *Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress)* (No. 2) [1996] 2 Lloyd’s Rep 319, at 328.

16 *Ibid.*

17 (1940) 68 Ll. L Rep. 75.

18 *Ibid.* at 81.

However, Lord Radcliffe in *Tsakiroglou & Co Ltd v Noblee Thorl GmbH*¹⁹ opined for a broader meaning of ‘reasonable’, as follows:

In my opinion there is no magic in the introduction of the formula ‘customary or usual route’ . . . the natural way to answer this question is to find out what is the usual thing in the same line of business. Various adjectives or phrases are employed to describe the point of reference. I can quote the following from judicial decisions: recognized, current, customary, accustomed, usual, ordinary, proper, common, in accordance with custom or practice or usage, a matter of commercial notoriety, and, of course, reasonable. I put ‘reasonable’ last because I think that the other phrases are at bottom merely instances of what it is reasonable to imply having regard to the nature and purpose of the contract.²⁰

Clearly there is a connection between what is reasonable and what is usual in the trade. But the question of what is a reasonable contract of carriage is broader than simply asking what is a usual contract of carriage, and this is where the further two steps or stages of the reasonableness test under s. 32(2) of the Act come into play.

1.4.2 Contract must be appropriate to grant sufficient protection to the goods while in transit

The seller is taken to possess reasonable knowledge of the characteristics of the goods they are selling and must therefore ensure that the contract of carriage provides for the taking of any necessary precautions to preserve them during the transit. As Bingham J said in *The Rio Sun*:²¹

In considering the cargo, the sellers were, in my view bound to possess reasonable knowledge of the characteristics of the goods they were selling and ensure that their contract of affreightment provided, whether expressly or by virtue of the duty lying on the shipowner, for the taking of any necessary precautions to preserve the goods during the voyage in question.

When procuring the contract of carriage, the seller is entitled to assume that the duration of the transit will not be longer than that which is usual, taking into account ordinary vicissitudes. However, if they procure a contract of carriage which takes a longer route than usual, it does not automatically follow that the seller is in breach by failing to procure a reasonable contract of carriage. In *Tsakiroglou & Co Ltd v Noblee Thorl GmbH*,²² in determining that a longer route than usual was a reasonable one within the meaning of s. 32(2) of the Act, Lords Reid and Radcliffe relied on the fact that there was no evidence that the longer voyage ‘would be prejudicial to the condition of the goods or would involve special packing or stowing’.²³

¹⁹ [1962] AC 93.

²⁰ See at 121–122.

²¹ [1985] 1 Lloyd’s Rep. 350, at 360.

²² [1962] AC 93 337 & 339.

²³ See at 337, 339.

In *BC Fruit Market Ltd v National Fruit Co.*²⁴ a Canadian case, the seller sold cabbages to be shipped on a heated train car but the bill of lading tendered failed to provide that the goods were to be carried on a heated train car, and when they arrived they were frozen. The buyer refused to take delivery of the cabbages and the seller sought to sue for the price. The Alberta Supreme Court held that the duty implied by the word ‘reasonable’ in the Act was one to provide the buyer with a contract of carriage by which:

[the carrier] would be bound to protect [the goods] from frost while in transit because that would clearly be the only contract which would be reasonable having regard to the nature of the goods and the other circumstances of the case.²⁵

There is, however, no need for the seller to procure a contract of carriage which stipulates exceptional, specialist or extraordinary measures need to be taken.²⁶

1.4.3 Contract must give the buyer protective rights against the carrier

In *Hansson v Hamel & Horley Ltd*²⁷ (a case looked at in more detail below) the House of Lords held that a CIF seller ‘has to cover the buyer by procuring and tendering documents which will be available for his protection from shipment to destination . . . When documents are to be taken up the buyer is entitled to documents which substantially confer protective rights throughout.’²⁸

The document procured by the seller must make the buyer a party to the contract concluded by the carrier and as a minimum must give the buyer title to sue in contract by virtue of s. 2(1)(a) of the Carriage of Goods by Sea Act 1924, although merely giving title to sue is unlikely to be sufficient to satisfy the reasonableness test. However, it is highly unlikely to require that the contract of carriage procured by the seller has to provide the buyer with a remedy or claim against the carrier for every eventuality: in other words, it does not require the seller to procure a contract of carriage where, whatever the loss or damage which has occurred, the buyer has a claim against the carrier.²⁹

1.5 Examples of contracts found to be unreasonable

It is often easier to consider what constitutes a reasonable contract of carriage by looking at examples of where contracts have been found by the courts to be unreasonable.

In *Young (Thomas) & Sons Ltd v Hobson & Partners*³⁰ the seller sold electrical engines on FOR³¹ terms. The engines were severely damaged during transit because

24 (1921) 59 DLR 87.

25 See at 89.

26 See *The Rio Sun* [1985] 1 Lloyd’s Rep. 350, at 359–360 (Bingham J).

27 [1922] 2 AC 36.

28 See at 44–46.

29 See further *Sassoon on CIF & FOB Contracts*, note 1 above, §2–028.

30 (1949) 65 T.L.R. 365.

31 Free On Rail.

they were not properly secured by battens. The contract of carriage arranged by the seller provided that the engines were to be carried at the owner's risk but they could have been sent at the same cost at the carrier's risk (subject to an inspection by the railway). The Court of Appeal held that the contract of carriage was not reasonable in the circumstances³² and the buyers were entitled to refuse delivery to the carrier as delivery to them. This case is probably an example of a case where the contract of carriage was found to be unreasonable both because it did not grant sufficient protection to the goods while in transit and because it did not give the buyer protective rights against the carrier.

In *Hansson v Hamel*³³ goods were sold CIF Kobe or Yokohama to be shipped from Norway in March/April 1920. The goods were shipped in April from the Norwegian port of Braatvag on the *Kiev* and carried to Hamburg where they were trans-shipped onto the *Atlas Maru*. The agent of the ocean carriers signed a document purporting to be a through bill of lading which stated that the goods were shipped on the *Kiev* 'lying in or off the port of Braatvag and bound for Hamburg for transshipment into the Atlas Maru . . . to be delivered to the port of Yokohama'.

The goods were damaged, and the buyers rejected the documents and refused to take delivery of the goods. Under the terms of the bill of lading, the ocean carriers were under no contractual responsibility in respect of the carriage of the goods from Braatvag to Hamburg. As Lord Sumner put it, '. . . though called a through bill . . . is not really so. It is the contract of the subsequent carrier only, without any complementary provisions to bind the prior carriers.'³⁴ The House of Lords held that the buyer's rejection of the documents was correct because they did not substantially confer protective rights throughout:

A cf and i seller . . . has to cover the buyer by procuring and tendering documents which will be available for his protection from shipment to destination . . . when documents are to be taken up the buyer is entitled to documents which substantially confer protective rights throughout.³⁵

1.6 An alternative route to s. 32(2)?

Given the little case law available where s. 32(2) of the Act has been successfully deployed, it is worth considering whether the courts have sought to achieve the same result via different means. *The Northern Progress*³⁶ is a good example of a case where an alternative route was found to provide the buyer with a remedy. In that case, the bill of lading tendered pursuant to a contract of sale CIF Rijeka/Koper incorporated 'all terms and conditions' of a charterparty which (unbeknown to the buyer) contained a war-related special diversion clause allowing the vessel to discharge in Hamburg. The sellers nominated Hamburg for discharge when Yugoslavia

³² See (1949) 65 T.L.R 365, at 366 (Tucker LJ).

³³ [1922] 2 AC 36.

³⁴ [1922] 2 AC 36, at 46.

³⁵ *Ibid.*, at 44–45.

³⁶ [1996] 2 Lloyd's Rep. 319.

was added by the London insurance market to the war-risk additional premiums area. The buyers took delivery under protest. At first instance the arbitrators held that the special diversion clause was not one usual and reasonable in the trade. On appeal to the High Court, Rix J had no difficulty in rejecting its incorporation into the sale contract and held:

Indeed, where one party A, is required by his contract with his contract partner B, to make another contract with a third party, C, by which his contract partner B is going to be bound, it may be that A is always under a duty, subject to special provision, to enter into a contract on usual terms: otherwise A will have it in his power to affect his contract with B by terms which B could not have anticipated.³⁷

Thus instead of finding a breach of s. 32(2) of the Act, the tribunal and the court held that the ‘unreasonable’ term was not incorporated into the contract of carriage at all. Such an alternative route may also account for why there is so little case law and judicial consideration of this little-known and seldom-applied provision in the Act.

1.7 Circumstances where s. 32(2) of the Act might successfully be used

If the contract of sale provides that goods are to arrive at their destination within a specified period, it is likely that the seller would be in breach of s. 32(2) of the Act, and found to have made an unreasonable contract of carriage, if the contract of carriage did not contain a stipulation as to the time of arrival. However, in such a case the seller would in any event be in breach of the terms of the contract of sale which provided that goods would arrive at destination within a specified period: thus the seller could not tender proper documents and the buyer would be entitled to reject on that ground. Thus the additional plea that they were in breach of s. 32(2) of the Act may not add anything.

The area where s. 32(2) of the Act may come into play in future litigation is safety. There may be cases of sellers procuring a contract of carriage on an unseaworthy ship and the buyer seeking to argue that because of this the seller failed to procure a reasonable contract of carriage. However, where the Hague or Hague-Visby Rules are usual terms or expressly incorporated or incorporated by usage (on which see below), it is unlikely that such a case would succeed. However, other specific areas of safety may give rise to litigation. One potential example is the Maritime Labour Convention which came into force on 20 August 2013. Ships found to be in breach of the Convention rules can be stopped and detained. It is arguable that a vessel stopped and detained for such a breach is not suitable for carriage of the goods,³⁸ and therefore concluding a contract of carriage for the goods on that vessel means that the contract of carriage is itself unreasonable.

³⁷ [1996] 2 Lloyd's Rep. 319, at 328.

³⁸ The International Transport Workers' Federation issued a press release in 2015 making this point. It is described in an article by Richard Faint, of Charter Wise Ltd, in the October 2015 issue (no 216) of *GAFTA World*, p. 5.

1.8 What are the buyer's remedies if the contract of carriage is unreasonable?

The buyer's remedies are only available where the goods are lost or damaged during the course of transit: mere delay is likely to be insufficient. Thus, assuming the goods are lost or damaged, the remedies available to a buyer are set out in s. 32(2) of the Act: namely the buyer may (1) decline to treat the delivery to the carrier as delivery to himself, or (2) hold the seller responsible in damages. In essence s. 32(2) of the Act places the risk of loss or damage during transit on the seller when otherwise it would normally pass on shipment to the buyer.³⁹

However, the buyer has a further remedy, namely rejection of the documents: see *Kwei Tek Chao v British Traders & Shippers Ltd.*⁴⁰ This is because the right to reject the documents and the right to reject the goods are two separate and distinct rights.⁴¹ The advantage of the remedy under the bill of lading is that, unlike s. 32(2) of the Act, the buyer does not have to prove that the goods were lost or damaged.

1.9 Authorising an unreasonable contract⁴²

Section 32(2) of the Act opens with the words '*Unless authorised by the buyer the seller must make . . .*', thus preserving freedom of contract. The question therefore becomes: how does a buyer authorise an unreasonable contract? Section 55(1) of the Act provides some guidance, as follows:

Where a right, duty or liability would arise under a contract of sale of goods by implication of law it may (subject to the Unfair Contract Terms Act 1977) be negated or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.

The duty on the seller set out in s. 32(2) of the Act arises by implication of law and therefore falls within s. 55(1). The section does not, however, allow the parties to create their own rules as to what amounts to a binding or enforceable contract or to disregard the effects of incapacity, misrepresentation or illegality.

Before considering the three exceptions specifically set out in s. 55(1) of the Act, it is important to consider whether the Unfair Contract Terms Act 1977 has any relevance for present purposes. The answer is that it is unlikely to, for one or both of two reasons. First, s. 26(1) of the 1977 Act expressly provides that it does not apply to an international supply contract. An international supply contract is defined in s. 26(3) and (4) as essentially a contract where there is a contract or sale (or a contract where possession or ownership of goods passes) and the seller and buyer are in different states (and goods are to be carried from one state to another). That is likely to be the case in a large number of CIF or CIP contracts, for example. Second, s. 27(1) of the 1977 Act expressly provides that the majority

³⁹ See further M.G. Bridge, *The International Sale of Goods* (3rd edn, OUP, 2013), §7.52.

⁴⁰ [1954] 2 QB 459.

⁴¹ [1954] 2 QB 459, at 480.

⁴² See generally *Sassoon on CIF & FOB Contracts*, note 1 above, §2-029.

of its provisions do not apply to a contract where the law of any part of the UK applies only by virtue of the provisions of a choice of law clause. Again, this is likely to be the case in a large number of CIF or CIP contracts.

1.9.1 Express agreement

The Act itself provides that an express condition or warranty does not negative a condition or warranty implied by the Act unless it is inconsistent with it: see s. 55(2) of the Act. That section did not form part of the 1893 Act and was only introduced by the Supply of Goods (Implied Terms Act) 1973.⁴³ Obviously whether a specifically incorporated clause will be inconsistent with a duty to provide a reasonable contract of carriage will be a matter for the court or tribunal to decide on the express wording of the contract concerned. One area where express agreement may oust s. 32(2) is where Incoterms are specifically incorporated into the contract of sale; this is because Incoterms themselves expressly set out the criteria of the contract of carriage required (see below for more details).

1.9.2 Course of dealing between the parties

Certain terms and conditions will not necessarily be incorporated into a contract simply because the parties have, on previous occasions, dealt with each other on those terms and conditions.⁴⁴ However, they may be incorporated by a course of dealing between the parties where each party has led the other to believe that it intended that their rights and liabilities should be determined by references to the terms of a document which had been consistently used between the parties in previous transactions. This will be a question of fact for the court or tribunal determining the particular case and will largely depend on the documents produced during disclosure.

1.9.3 Such usage as binds both parties to the contract

When considering custom and usage, the usual rule is that a usage or custom must be reasonable, universally accepted by the particular trade or profession or at the particular place, certain, not unlawful and not inconsistent with the express or implied terms of the contract.⁴⁵ In the context of contracts of sale between international parties, the most likely terms to be considered as a usage which binds both parties to the contract are those contained in the Hague or Hague-Visby Rules. Those rules allocate risk and set out when the contractual carrier will be liable for loss or damage to goods carried on board the vessel. They will therefore have an impact on the buyer's protective rights against the carrier. It would

⁴³ And was itself amended by the Sale and Supply of Goods Act 1994.

⁴⁴ See generally *Chitty on Contracts* (32nd edn, Sweet & Maxwell, 2015), Vol. 1, 13–011 and the cases cited in footnote 54.

⁴⁵ These requirements were accepted by Roskill J in *Oricon Waren-Handels GmbH v Intergraan NV* [1967] 2 Lloyd's Rep. 82, at 96.

be surprising for a court or tribunal to find a seller in breach of s. 32(2) of the Act by reason of procuring a contract of carriage which incorporated the Hague or Hague-Visby Rules, and one way round such an outcome would be a finding that the buyer had authorised the seller to tender an unreasonable contract of carriage by reason of usage, namely that the incorporation of Hague or Hague-Visby Rules is universally accepted in the trade, certain and not unlawful.

1.10 Incoterms

Incoterms are produced by the International Chamber of Commerce ('ICC'). They are a series of rules on the use of domestic and international trade terms and are designed to facilitate the conduct of global trade. They were first created in 1936 and have been regularly updated since: the latest version was published in 2010 and came into force on 1 January 2011. To apply, they are usually expressly incorporated into contracts of sale (although they may be included by reason of a course of dealing between parties). Some standard forms of contracts expressly exclude them: for example GAFTA⁴⁶ and FOSFA⁴⁷ exclude the use of Incoterms in their contracts.

The latest version contains 11 terms which are divided into two broad categories: (1) rules for any mode or modes of transport and (2) rules for sea and inland waterway transport. The terms falling into the former are EXW, FCA, CPT, CIP, DAT, DAP and DPP. The terms falling into the latter are FAS, FOB, CFR and CIF. Each term sets out a series of articles relating to the seller's obligations (the A Articles) and the buyer's obligations (the B Articles). For present purposes, we are only concerned with CIP and CIF.

1.10.1 CIF

The Guidance Notes to CIF make clear that the risk of loss of or damage to the goods passes when the goods are on board the vessel, and the seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. The seller must also obtain insurance cover against the buyer's risk of loss or damage during the carriage (although only minimum cover is required). The Articles expressly set out the requirements for the contract of carriage.

Article A3a of the CIF Incoterm provides as follows:

Contract of Carriage

The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named port of destination or, if agreed, any point at that port. The contract of carriage must be made on usual terms at the seller's expense and provide for carriage by the usual route in a vessel of the type normally used for the transport of the type of goods sold.

⁴⁶ The Grain and Feed Trade Association.

⁴⁷ The Federation of Oils, Seeds and Fats Associations Ltd.

Article A3a therefore differs from s. 32(2) of the Act in that the contract needs only to be on *usual* terms as opposed to reasonable terms; thus the second and third stages of the reasonableness test discussed above are irrelevant (although, as set out below, Article A8 also provides for the type of delivery document required). It is also more prescriptive than s.32(2) of the Act in that it expressly provides that the contract of carriage must be for the usual route in a vessel of the type normally used to transport the type of goods sold. Article A8 materially provides:

Delivery document

The seller must, at its own expense, provide the buyer without delay with the usual transport document for the agreed port of destination.

The transport document must cover the contract goods . . . enable the buyer to claim the goods from the carrier at the port of destination and, and unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier . . .

1.10.2 CIP

A contract of sale incorporating the CIP Incoterm is often appropriate where the goods being sold are containerised. This is because containers are typically delivered at a terminal, i.e. at a time prior to delivery onto the vessel.⁴⁸ Where CIP is the incorporated rule, the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place and the seller must contract and pay for the carriage necessary to bring the goods to the named place of destination. The seller also contracts for insurance cover against the buyer's risk of loss or damage to the goods during the carriage (although it is only required to obtain minimum insurance cover unless otherwise agreed). Like the CIF term, the Articles in the CIP term expressly set out the requirements for the contract of carriage to be procured by the seller.

Article A3a of the CIP Incoterm provides as follows:

Contract of carriage

The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named place of destination or, if agreed, any point at that place. The contract of carriage must be made on usual terms at the seller's expense and provide for carriage by the usual route and in a customary manner. If a specific point is not agreed or is not determined by practice, the seller may select the point of delivery and the point at the named place of destination that best suit its purpose.

Thus, similar to the CIF term, Article A3a differs from s. 32(2) of the Act in that the contract needs only to be on *usual* terms as opposed to reasonable terms, i.e. the first stage or step of the reasonableness test only. Similarly, by setting out specific features the contract must have, it is more prescriptive than s. 32(2) of the Act. Article 8 of the CIP term differs from the same article in the CIF term

⁴⁸ See the CIF Guidance Notes at p.113 of Incoterms 2010.

in that the obligation on the seller to procure a transport document is not absolute. Article 8 provides as follows:

Delivery document

If customary or at the buyer's request, the seller must provide the buyer, at the seller's expense, with the usual transport document(s) for the transport contracted in accordance with A3.

This transport document must cover the contract goods and be dated within the period agreed for shipment. If agreed or customary, the document must also enable the buyer to claim the goods from the carrier at the named place of destination and enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier.

1.11 Conclusions

Where, as here, a provision has attracted very little judicial consideration, it is tempting to say that the lack of case law is an indication that it is not a provision that routinely assists buyers and therefore has a very limited scope. However, there are instances where it might be of use to buyers, and the likely area of growth in such litigation relates to safety.

CHAPTER 2

Slow steaming clauses and international sales contracts

A successful marriage?

*Dr Theodora Nikaki**

2.1 Introduction – setting the scene

The global financial crisis has affected the world in many ways, including how different industries worldwide, including the shipping sector, conduct their business. Bunker prices went up,¹ while at the same time trade dropped dramatically, leading to a shrinking demand for transport and in turn to oversupply of vessels, a matter exacerbated by the delivery of new-built vessels ordered before the economic recession.² The shipping sector responded quickly to the financial downturn by deliberately slowing down the speed of seagoing vessels ('slow steaming') in order to reduce operating costs³ and also absorb excess fleet capacity.⁴ Slower transit times have reduced, at least to a certain extent, the imbalance between the supply of shipping and the demand for it, which otherwise would have had a more acute negative impact on freight rates and increased the idling costs of 'laid-up' vessels.⁵ Slow steaming was first introduced in container lines around 2007–2008, and was soon afterwards extended to other types of ships including tankers and

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1 Oil prices more than doubled between 2005 and 2012 and increased by more than half following 2007. It is also estimated, for example, that between 2003 and 2006 the cost of bunker fuel averaged 85 per cent of the daily running costs of a ship. Since 2008 the cost of bunker fuel again increased dramatically and in 2012 amounted to over three times the daily cost of time-chartering a vessel. See United Nations Conference on Trade and Development (UNCTAD), 'Review of Maritime Transport 2013', p. 26, available at http://unctad.org/en/PublicationsLibrary/rmt2013_en.pdf (last accessed on 15/12/2015).

2 M. Maloni et al., 'Slow Steaming Impacts on Ocean Carriers and Shippers', 15 *Maritime Economics & Logistics* 151, 154 (2013); M. Zanne et al., 'Environmental and Economic Benefits of Slow Steaming', *Transactions of Maritime Science* 123, 124 (2013).

3 Savings vary depending on the size and type of the vessel, the vessel's route and actual and fuel efficiency relative to speed. For example, running a 10,000 TEU containership at 18–20 knots instead of 20–25 knots can result in daily savings of 175 tonnes of bunkers. Furthermore, super-slow steaming at 15–18 knots leads to additional savings of 100 tonnes per day. See Zanne, note 2 above, at 125 and also the discussion in J. Faber et al., 'Regulated Slow Steaming in Maritime Transport: An Assessment of Options, Costs and Benefits' (Report), Delft, February 2012, pp. 11 and 91; and Maloni, note 2 above, at 153.

4 UNCTAD, 'Review of Maritime Transport 2013', note 1 above, at p. 27; Maloni, note 2 above, at 154 and 166; Zanne, note 2 above, at 125.

5 It is estimated that super slow steaming may absorb 4 per cent of the available fleet. Maloni, note 2 above, at 154.

dry bulk carriers, whose operating speeds were traditionally lower when compared to container ships.⁶

While fuel cost savings and other operational considerations, such as the utilisation of available capacity, are by far the most important reasons for reducing vessels' speed, one also should not underestimate the impact of slow steaming on cutting harmful emissions from sea transportation. There is clear scientific evidence that reduced fuel consumption is inexorably linked with lower levels of carbon dioxide, sulphur and nitrous oxide emissions.⁷ It is, for instance, estimated that a 10 per cent reduction in global maritime speeds equates to carbon dioxide savings of 19 per cent, even after taking into account the emissions produced by additional vessels employed to carry the same amount of cargo.⁸

To optimise the commercial and cost benefits arising out from slow steaming, the shipping industry has effected significant changes to its network, including irreversible engine replacement, derating, propeller upgrading and the acquisition of new-built vessels designed to operate at lower speeds ('eco-ships').⁹ The sector's significant investment in slow steaming – alongside the oversupply of tonnage and increased governmental and international emissions control measures – thus justifies its reluctance to increase vessel speeds notwithstanding the significant fall in fuel prices since the second half of 2014, which would otherwise make it less expensive to operate fewer ships at full speed than more of them at slower speeds.¹⁰

Although there is no doubt that slow steaming has now become a widely adopted practice, there is no universal definition which clearly delineates the different types of slow steaming and their margins. A rather detailed but also too technical definition is found in 'BIMCO's Slow Steaming Clause for Time Charter Parties'.¹¹ This

6 Baltic and International Maritime Council (BIMCO) Slow Steaming Clause for Time Charter Parties, Special Circular No.7/2011, available at https://www.bimco.org/Chartering/Clauses_and_Documents/Clauses/Slow_Steaming_Clause.aspx (last accessed on 15/12/2015). It is also worth noting that the practice of slow steaming had previously been adopted in the 1970s during the first oil crisis: Zanne, note 2 above, at 125.

7 See International Maritime Organisation (IMO) 'Reduction of GHG Emissions from Ships-Third IMO GHG Study 2014 – Final Report' (25 July 2014), Marine Environment Protection Committee, 67th session, MEPC 67/INF.3; Faber, note 3 above, at 15–16; Maloni, note 2 above, at 153 and 164–166; Zanne, note 2 above, at 124–125. See further J. Yin et al., 'Slow Steaming of Liner Trade: Its Economic and Environmental Impacts', 41 *Maritime Policy & Management* 149 (2014).

8 Zanne, note 2 above, at 125. For example, in 2010, Maersk reduced the carbon dioxide greenhouse emissions of its vessels by two million tonnes by slowing them down.

9 Zanne, note 2 above, at 125; IMO, 'Investigation of appropriate control measures (abatement technologies) to reduce Black Carbon emissions from international shipping' (Report), 20 November 2012, prepared by a consortium led by LITEHAUZ (Denmark), §§ 3.4 and 5.2, available at <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Documents/Air%20pollution/Report%20IMO%20Black%20Carbon%20Final%20Report%2020%20November%202012.pdf> (last accessed on 15/12/2015).

10 D. Brett, 'Box lines faced with slow steaming conundrum' (15 January 2015), 2015 Lloyd's List, available at <http://www.lloydslist.com/ll/sector/containers/article455293.ece> (last accessed on 15/12/2015); 'Maersk Line sticks to slow steaming' (22 October 2014), available at <http://shippingwatch.com/carriers/Container/article7131488.ece> (last accessed on 15/12/2015). See for example, the IMO International Convention on Prevention of Pollution from Ships (MARPOL 73/78), Annex IV – Regulation 14 – Sulphur oxides (SOx), which sets a long-term plan to limit sulphur oxide and particulate matter emissions.

11 BIMCO Slow Steaming Clause for Time Charter Parties, sub-clause (a) available at https://www.bimco.org/Chartering/Clauses_and_Documents/Clauses/Slow_Steaming_Clause.aspx (last accessed on 15/12/2015).

clause makes a distinction between ‘slow steaming’ and ‘ultra-slow steaming’ based on whether the engines continue to operate above (‘slow steaming’), or above/below (‘ultra-slow steaming’) the cut-out point of the ship’s engines auxiliary blowers.¹² In simple words, ‘slow steaming’ is usually described as the reduction of vessel speed from 22–24 knots to 18 knots, while ‘super-slow steaming’ is equated to proceeding with a speed below 18 knots.¹³

Moreover, from a legal perspective, slow steaming practices are *prima facie* in conflict with owners’ express¹⁴ or implied¹⁵ undertaking to proceed with utmost despatch, namely their duty to accomplish the voyages at full speed and by the shortest and quickest route.¹⁶ Put simply, unless otherwise agreed, the owners of a chartered vessel who opt to deliberately reduce the speed of their vessel to save fuel run the risk of being held in breach of their utmost despatch obligation, since their decision to sail at such a lower speed cannot be justified by mechanical problems, adverse weather or any other viable explanation.¹⁷ Similarly, slow steaming practices may expose owners as carriers to liability to holders of bills of lading. Unless the parties expressly or by implication provide otherwise, contracts of carriage impose on carriers an implied obligation to prosecute the contracted voyage with reasonable despatch, which carriers will not meet if the vessel deliberately slows down.¹⁸

To bridge the gap between the law and the practice, as well as to strike a balance between owners’ and charterers’ competing interests, BIMCO spearheaded a project on slow steaming clauses for both time and voyage charterparties.¹⁹ In a nutshell, both clauses drafted by BIMCO set the parameters for slow steaming and also deal with the owners’ liability to charterers and holders of bills of lading.

12 Ibid., sub-clause (a)(i)(slow steaming) and (a)(ii)(ultra-slow steaming) with slow steaming being the default position.

13 See e.g. A.P. Moller-Maersk Group Definitions, available at http://files.shareholder.com/downloads/ABEA-3GG91Y/2428187051x0x577328/e3c9f031-6baa-4f11-ac1e-5e58c20bf35e/Definitions_UK.pdf (last accessed on 15/12/2015) For other definitions, see for example Maloni, note 2 above, at 153.

14 See for example New York Produce Exchange Time Charter (NYPE) 93, cl. 8 (a) and NYPE 2015, cl. 8(a).

15 *Davis v Garrett* (1830) 6 Bing 716, [1824–34] All ER Rep 286.

16 *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638, 641 (Lord Bingham), 647 (Lords Nicholls, Hoffmann and Hope) and 653–655 (Lord Hobhouse), [2001] 1 Lloyd’s Rep 147 (HL), [2001] 1 Lloyd’s Rep 147, 149 (Lord Bingham), 153 (Lords Nicholls, Hoffmann and Hope) and 156–158 (Lord Hobhouse) (duty to take quickest and shortest route unless some other route is usual or other maritime reason not to do so); *Ease Faith v Leonis* [2006] EWHC 232; [2006] 1 Lloyd’s Rep 673 [131] (Smith J) (obligation to proceed at the maximum speed that is consistent with normal navigation and normal use of the engine power); *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] EWHC 2595, [2012] 2 Lloyd’s Rep 533 [44] (Popplewell J).

17 *The Pearl C*, note 16 above.

18 The implied obligation to proceed with reasonable despatch arises from the nature of the contract of carriage and is deemed necessary in order to give it commercial efficacy: *Fyffes Group Ltd v Reefer Express Lines Pty Ltd (The Kriti Rex)* [1996] 2 Lloyd’s Rep 171, 191 (Moore-Bick J). However, as reasonable despatch is merely implied in the contract and not required by the Hague or the Hague-Visby Rules, its exclusion will not be caught by art. III, r.8.

19 See BIMCO Slow Steaming Clause for Time Charter Parties and BIMCO Slow Steaming Clause for Voyage Charter Parties, available at https://www.bimco.org/Chartering/Clauses_and_Documents/Clauses/Slow_Steaming_Clause_for_Voyage_CP.aspx (last accessed on 15/12/2015).

In terms of time charters, the pertinent BIMCO slow steaming clause reflects the dichotomy between employment orders and navigation, as defined in *The Hill Harmony*.²⁰ It entitles charterers to give owners slow steaming instructions within agreed limits ('slow steaming' or 'ultra-slow steaming'), which the owners must follow, though always taking into account factors such as the safety of vessel, crew and cargo, the protection of the marine environment, as well as the compliance with the 'specified time of arrival at a particular destination'.²¹ On the other hand, the corresponding slow steaming clause for voyage charters grants such a right to owners, on the basis that they are responsible for running and fuelling the vessel, but again only within the agreed limits.²² To avoid any litigation over the breach of the owners' utmost despatch obligation arising out of slow steaming, both clauses expressly provide that proceeding at a reduced speed in accordance with their terms will not amount to breach of that obligation.²³

In a similar vein, both BIMCO clauses shield owners from claims brought by holders of bills of lading or other transport documents by imposing on charterers an obligation to ensure that the terms of any such documents issued by them allow slow steaming. Moreover, under such clauses, charterers agree to indemnify owners for liabilities arising from claims filed by cargo owners for breach of the owners' (in their capacity as carriers) implied obligation to proceed with utmost despatch.²⁴

Furthermore, as international transportation of goods forms an integral part of international trade, the incorporation of slow steaming clauses in charterparties and, in turn, in bills of lading issued under them gives rise to a number of potential legal issues related to international sales contracts. In other words, whatever their status as between owners and charterers (as CIF sellers or FOB buyers), such slow steaming clauses may not always be compatible with the terms of the underlying sales contracts. This effectively means that there may be cases where sellers (in either CIF or FOB contracts) or buyers (under FOB contracts) may be held in breach of contract if their transportation agreements stipulate a liberty to slow steam.

Against this background, this chapter will first examine whether slow steaming clauses included in bills of lading are in conflict with the sellers' undertaking to procure a reasonable contract under the Sale of Goods Act 1979 (SGA), s. 32(2)²⁵ and to tender a conforming bill of lading.²⁶ It will then address how slow steaming

20 *The Hill Harmony* [2001] 1 AC 638, 646 (Lord Bingham), 647 (Lords Nicholls, Hoffmann and Hope) and 658 (Lord Hobhouse), [2001] 1 Lloyd's Rep 147, [2001] 1 Lloyd's Rep 147, 152 (Lord Bingham), 153 (Lords Nicholls, Hoffmann and Hope) and 160 (Lord Hobhouse).

21 BIMCO Slow Steaming Clause for Time Charter Parties, sub-clause (a)–(b).

22 BIMCO Slow Steaming Clause for Voyage Charter Parties, sub-clause (a).

23 BIMCO Slow Steaming Clause for Time Charter Parties, sub-clause (c) and BIMCO Slow Steaming Clause for Voyage Charter Parties, sub-clause (b).

24 BIMCO Slow Steaming Clause for Time Charter Parties, sub-clause (f) and BIMCO Slow Steaming Clause for Voyage Charter Parties, sub-clause (c).

25 See also the general discussion on SGA, s. 32(2) in Chapter 1 of this book.

26 *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743, 757 (Hamilton LJ) (FOB contracts); *Ranson (TW) Ltd v Manufacture d'Engrais et de Produits Industriels* (1922) 13 Ll L Rep 205, 205 (Greer J) (CIF contracts).

may impact the obligation on parties (whether CIF²⁷ sellers or FOB buyers) to ensure that the goods are put on board within the shipment period²⁸ or comply with a laycan spread.²⁹ The discussion will not only reveal the complexities associated with slow steaming clauses but will also suggest solutions to facilitate a ‘successful marriage’ between slow steaming clauses and international sales contracts. As a final note, this paper will evaluate the parties’ position in the context of English law but, if necessary, short references may be made to Incoterms 2010³⁰ or the United Nations Convention on Contracts for the International Sale of Goods (CISG)³¹ in the relevant footnotes.

2.2 ‘Reasonable contract of carriage’ and slow steaming

Contracts of sale governed by English law impose on sellers who agree to send goods to the buyer a presumptive obligation under s. 32(2) of the Sale of Goods Act 1979 to procure a ‘reasonable contract of carriage’ for the goods sold.³² The same provision also specifies that the reasonableness of the tendered contract of affreightment is to be judged on a case-by-case basis, that is, against the nature of the goods carried and any other relevant circumstances of the case. In that respect, SGA, s. 32(2) raises a number of topical questions regarding the conformity of contracts of carriage providing for slow steaming with the sellers’ duty to tender a reasonable contract of affreightment, especially in the light of the pertinent BIMCO clauses, which impose on charterers the obligation to ensure that any bills of lading issued under such charterparties allow for slow steaming.³³ It is thus worth exploring whether a CIF or FOB seller³⁴ who procures a contract of carriage permitting slow steaming fulfils its obligation under SGA, s. 32(2).

A reading of the limited number of cases on the definition of the ‘reasonable contract’ test leads to the conclusion that the seller will fulfil its SGA, s.32(2) obligation if it procures a contract of carriage which is ‘usual and customary’ in

27 The discussion will focus on CIF contracts but it applies equally to C & F (CFR) contracts.

28 *Landauer & Co v Craven & Speeding Bros* [1912] 2 KB 94, 105 (Scrutton J) (CIF contracts); *Bunge & Co v Tradax England Ltd* [1975] 2 Lloyd’s Rep 235, 239 (Donaldson J) (FOB contracts).

29 *ERG Raffinerie Mediterranee SpA v Chevron USA Inc (The Luxmar)* [2007] EWCA 494, [2007] 2 Lloyd’s Rep 542, affirming [2006] EWHC 1322, [2006] 2 Lloyd’s Rep 543.

30 International Commercial Terms 2010.

31 1489 UNTS 3. The CISG entered into force on 1 January 1988.

32 See also CISG, art. 32(2) making reference to ‘contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation’ (emphasis added) and Incoterms 2010, CFR A 3(a), CIF A 3(a) and FOB A3 (a) referring to contracts of carriage concluded ‘on usual terms’.

33 BIMCO Slow Steaming Clause for Time Charter Parties, sub-clause (f) and BIMCO Slow Steaming Clause for Voyage Charter Parties, sub-clause (c). See also BIMCO CONLINEBILL 2000, cl. 5 which confers on the carriers a right to slow steam without liability for delay.

34 On the applicability of SGA, s.32 (2) to CIF and the first two types of FOB contracts, see *Benjamin’s Sale of Goods* (9th edn, Sweet & Maxwell, 2014), § 18–289 and M. Bridge, *The International Sale of Goods* (3rd edn, OUP, 2013), §§3.16 (footnote 77), 4.07, 4.101 and 7.51. See also *Houlder Bros & Co Ltd v Public Works Commissioner* [1908] AC 276, 290 (Lord Atkinson) and *Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress)* (No. 2) [1996] 2 Lloyd’s Rep 319, 327–328 (Rix J).

the trade in question,³⁵ appropriate for the voyage and the carriage of the particular goods³⁶ and also grants the buyer protective rights against the carrier.³⁷

Applying this test to contracts of carriage stipulating slow steaming, the first question is whether such a carriage contract is deemed customary – not in trade generally, as the case is anyway given the widespread acceptance of slow steaming practices – but in the transportation of the particular goods sold. In other words, slow steaming practices may be customary in one trade but not another, depending for example on the nature of the goods. This is a question of fact in each case to be determined by the circumstances prevailing at the date when the goods are shipped.³⁸ Hence, to prove the widespread adoption of slow steaming clauses in the trade at issue, sellers might be expected to call expert witnesses or even rely on a review of carriage contracts used in the particular trade.³⁹

If sailing at reduced speed has become ordinary in the trade in question, CIF or FOB buyers can be expected to be conscious of the longer transit time and make the necessary logistical arrangements at the port of discharge. Therefore, unless a specific delivery date is stipulated in the sale contract,⁴⁰ they cannot complain about the additional time it will take to perform the sea voyage and sue the sellers for delay in delivery. The sellers will be deemed to have discharged their delivery obligation when handing over the goods to the carrier for transmission to the buyer.⁴¹

At this point it is worth mentioning that the application of s. 32(2) to CIF and the extended FOB contracts does not pose any serious difficulties, as it is the seller who makes all the transportation arrangements, that is to say both the charterparty and the bill of lading contracts.⁴² Therefore, it is expected that a diligent seller would enter into a charterparty which allows for sailing at reduced speed only if slow steaming is usual in the carriage of goods in question.

Even if a CIF or FOB seller establishes that contracts of carriage allowing for slow steaming are common in the particular trade, he will only discharge his obligation under s. 32(2) if the carriage contract is also suitable for the prolonged

35 *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743, 757 (Hamilton LJ) ('reasonable and ordinary bill of lading or other contract of carriage'); *The Northern Progress*, note 34 above, 328 ('reasonable and acceptable in the trade' or 'usual and customary' or a contract of carriage which does not contain 'unreasonable or unusual terms'). See further the discussion on SGA, s. 32(2) in Chapter 1 and *Sassoon: CIF and FOB Contracts* (5th edn, Sweet & Maxwell, 2012), §§2-024-2-031.

36 *Gatol International Inc v Tradax Petroleum Ltd (The Rio Sun)* [1985] 1 Lloyd's Rep 350, 359-360 (Bingham J). See also Lord Radcliffe's discussion of the reasonableness of a contract of carriage in the context of the selected route: *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93, 122, [1961] 1 Lloyd's Rep 329, 338-339.

37 *Young (Thomas) & Sons Ltd v Hobson* (1949) 65 TLR 365, 366 (Tucker LJ).

38 And not when the contract of sale was concluded: see *Tsakiroglou*, note 36 above, [1962] AC 93, 132, [1961] 1 Lloyd's Rep 329, 344 (Lord Guest) and *The Rio Sun*, note 36 above, [1985] 1 Lloyd's Rep 350, 360 (Rix J).

39 See for example, *Finska Cellulosaföreningen (Finnish Cellulose Union) v Westfield Paper Co Ltd* [1940] 4 All ER 473, 478, (1940) 68 Ll L Rep 75, 81 (Viscount Caldecote CJ).

40 *Cargill International SA v Bangladesh Sugar & Food Industries Corp* [1998] 1 WLR 461, 465 (see in particular clause 16 in the contract of sale examined in that case). See also the cases referred to in note 63 below.

41 SGA, s. 32(1).

42 See *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, 424 (Devlin J).

voyage and the actual goods sold.⁴³ This effectively means that the seller, who has or should have reasonable knowledge of the characteristics of what he sells, owes a duty to conclude a contract of carriage that provides for sufficient protection of the goods even in the context of an extended voyage.⁴⁴ Thus, if loss of or damage to the goods is a likely result of slow steaming, the carriage contract should provide for all necessary measures – though not exceptional precautions – to preserve the goods during the longer transit time at sea.⁴⁵ This may, for example, be so in the case of perishable cargo which, owing to its sensitive nature, may not withstand an extended transit unless heated or refrigerated or specially packed or ventilated.⁴⁶ This is in fact an issue already addressed by the shipping industry by adopting new technologies in temperature and atmosphere control systems to delay the ripening and decay of different types of fruit and vegetables and extend the shelf life of perishable products.⁴⁷ It is therefore submitted that a contract of carriage of perishable goods will be ‘reasonable’ within the meaning of SGA, s. 32(2) only if it also provides for the use of any suitable temperature and atmosphere control system, which would offset the possible adverse impact of the longer transit time.

Similarly, the procured contract of carriage should also be reasonable and proper having regard to ‘the other circumstances of the case’. An example would be where the vessel has to transit an area infested with pirates,⁴⁸ where slow steaming might make the vessel more vulnerable and possibly conflict with the seller’s obligation to procure a contract of affreightment which provides for sufficient protection to the goods while carried through such an area of high risk of cargo loss or of damage.⁴⁹ One might argue that in such a case the adoption of industry-recommended preventive measures to combat piracy such as those advocated

43 *The Rio Sun*, note 36 above, [1985] 1 Lloyd’s Rep 350, 360 (Rix J).

44 *Ibid.*

45 *Ibid.* Considering the reasonableness of the longer route round the Cape of Good Hope due to the closure of the Suez Canal within the meaning of SGA, s.32(2), in the light of the possible impact of the prolonged voyage to the preservation of the goods, see *Tsakiroglou*, note 36 above, [1962] AC 93, 118 (Lord Reid), 123 (Lord Radcliffe), 126 (Lord Hodson), [1961] 1 Lloyd’s Rep 329, 336–337 (Lord Reid), 339 (Lord Radcliffe) 341–342 (Lord Hodson).

46 See the point on the correlation between the concept of reasonable contact under SGA, s. 32(2) and the requirement of special packing or stowage addressed by Lord Radcliffe in *Tsakiroglou*, note 36 above, [1962] AC 93, 123, [1961] 1 Lloyd’s Rep 329, 339.

47 For example, Controlled Atmosphere (CA), Modified Atmosphere (MA) and Fresh Air Exchange chill boxes. See S. Nall, ‘Technology Helps Combat Effects of Slow-Steaming on Perishables’ (27 February 2014), *Journal of Commerce Online*, available at http://www.joc.com/international-logistics/cool-cargoes/technology-helps-combat-effects-slow-steaming-perishables_20140227.html (last accessed on 15/12/2015); ‘Cargo Risks with Green Ship Schedules’, Allianz Risk Bulletin, No 45 (February 2014), available at <http://www.agcs.allianz.com/assets/PDFs/risk%20bulletins/Allianz%20Risk%20Control%20Bulletin%20-%20Cargo%20Risks%20web.pdf> (last accessed on 15/12/2015).

48 Admittedly, according to the figures provided by the International Maritime Bureau (IMB), the world’s only manned centre receiving and disseminating reports of piracy and armed robbery, worldwide piracy has reached its nadir in seven years with only 231 incidents worldwide reported in 2014 and 190 reported incidents in 2015 (up to 5 October 2015). Nevertheless, even though piracy is at its lowest level since 2007, the risk of being approached or attacked by pirates is still appreciable.

49 It should be also noted that the BIMCO Slow Steaming clause for Time Charters makes slow steaming subject to the master’s obligation in respect, *inter alia*, of the safety of the cargo. (BIMCO Slow Steaming Clause for Time Charterparties, sub-clause (a)(i) or (ii) and (b)(iii).)

in BMP4,⁵⁰ or in the piracy guidance provided in the IMO Maritime Security Committee (MSC) Circulars may be equated to the necessary measures to protect the goods from piracy while the vessel slow steams.⁵¹ BMP4, for example, recommends vessels to sail with a speed of at least 18 knots throughout their transit of the high risk area,⁵² since there have been no reported piratical attacks against vessels sailing at over 18 knots,⁵³ and furthermore to increase their speed immediately after identifying any suspicious vessel, in order to prevent the pirates from boarding on the vessel.⁵⁴ If this argument holds true, contracts of carriage permitting super-slow steaming or generally sailing at a speed lower than that recommended in BMP4 (if amended in the future) might well fail the s. 32(2) reasonableness test, if the vessel is scheduled to transit through the BMP4 high-risk area.

By contrast, it seems very unlikely that a carriage contract allowing slow steaming in piratical areas would be deemed unreasonable merely because it does not also secure the presence of armed guards on board. For one thing, while the IMO acknowledges that the employment of privately contracted armed guards has become established practice, it also accepts that the carriage of armed personnel should remain an individual decision subject to the law of the flag state, which may not allow such practices.⁵⁵ In addition, there are examples of countries which have exercised their right of sovereignty in their territorial sea and have implemented legislation prohibiting the presence of foreign armed guards on vessels sailing in their territorial waters.⁵⁶

50 See the Best Management Practices for Protection against Somalia Based Piracy, version 4 (published in August 2011). The IMO recognises the importance of the BMP4 and the need to comply with its provisions, and therefore recommends that it be applied throughout the high risk area (HRA), as defined in its terms, and in the Internationally Recommended Transit Corridor (IRTC) and be considered as the first, minimum, preventative option. IMO 'Piracy and Armed Robbery against Ships in waters Off the Coast of Somalia: Best Management Practices for Protection against Somalia Based Piracy' (14 September 2011), MSC.1/Circ.1339, §1 and IMO 'Interim Guidance to Private Maritime Security Companies providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012), MSC.1/Circ.1443, Annex §5.4.

51 Available at <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx> (last accessed on 15/12/2015).

52 As defined in BMP4, s. 2 (effective 1 December 2015).

53 The minimum speed limit was based on the statistics reported up to August 2011. The BMP4 therefore recommends that reference should be made to the Maritime Security Centre – Horn of Africa (MSCHOA), NATO Shipping Centre and Maritime Liaison Office (MARLO) websites for the latest threat guidance regarding pirate attack speed capability.

54 BMP4, s. 3.4.

55 See United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3, arts. 92 and 94; IMO 'Interim Guidance to Private Maritime Security Companies providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012), note 50 above, Annex §1.2; IMO 'Revised Interim Recommendations for Flag States Regarding the Use of privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (12 June 2015), MSC.1/Circ.1406/Rev.3, Annex §§1–2, providing guidance on the use of armed guards to flag states who have determined that their employment on board vessels is appropriate and lawful. See also the IMO 'Interim Recommendations for Port and Coastal States Regarding the Use of privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1408 /Rev.1, Annex § 2, which are not, however, 'intended in any manner to override or otherwise interfere with the implementation and enforcement of the national legislation of a State or to interfere with that State's rights under international law'.

56 For example, the national laws of the Gulf of Guinea countries provide that foreign security guards are not permitted to carry firearms on board merchant vessels within their territorial waters. See further "BIMCO Guidelines for the use of GUARDCON when engaging PMSCs as intermediaries to employ local security guards within territorial waters", Special Circular, No. 1 (20 February 2014),

As regards the third requirement of the reasonableness test under s. 32(2), namely that the contract of carriage should not deprive a CIF or FOB buyer of his protective rights against the carrier,⁵⁷ there is no reason to see any inconsistency between this and a slow steaming stipulation. The reason is that it would not be reasonable for these buyers to assume that they would be entitled to sue the carrier for breach of his (implied) reasonable despatch obligation when slow steaming was usual in the trade in question.⁵⁸ A different interpretation would flout business common sense as all contracts of affreightment allowing for slow steaming would be deemed unreasonable, rendering slow steaming clauses meaningless.

If CIF or FOB sellers fail to meet the reasonableness test set out in s. 32(2) and the goods are lost or damaged in transit because of the extra time at sea,⁵⁹ as for example this may happen in the case of perishable goods where no additional precautions are taken, the buyers may decline to treat the delivery to the carrier as delivery to them.⁶⁰ If the buyers opt to do this, they can effectively reject the goods, ignoring the normal rule that risk passes on shipment, and, where appropriate, sue the sellers in addition for damages for non-delivery.⁶¹ Alternatively, they may accept the goods and simply hold the seller responsible in damages.⁶²

Strictly speaking, the remedy in s. 32(2) will be triggered only if the goods are lost or damaged because of the prolonged voyage but not if they simply arrive late at the port of discharge owing to slow steaming (assuming this is not usual in the trade in question). It is of course always possible for buyers wishing to secure the arrival of the purchased goods by a particular date to negotiate a watertight 'delivery clause' or conclude their sales contract on 'CIF delivered terms', as the case may be for instance in oil trade where logistic arrangements are more complicated.⁶³ If the goods are then delivered late because the vessel has sailed at

available at https://www.bimco.org/~media/Chartering/Special_Circulars/SC2014_01.ashx (last accessed on 15/12/2015).

57 *Young (Thomas) & Sons Ltd v Hobson* (1949) 65 TLR 365, 366 (Tucker LJ). See also the discussion on the third limb of the reasonableness test in Chapter 1 and *Sassoon: CIF and FOB Contracts* (5th edn, Sweet & Maxwell, 2012), § 2–028.

58 On the exclusion of the reasonable despatch obligation in carriage contracts, see *Fyffes Group Ltd v Reefer Express Lines Pty Ltd (The Kriti Rex)* [1996] 2 Lloyd's Rep 171, 191 (Moore-Bick J).

59 Although the SGA, s. 32(2) does not make express reference to a causal link between the breach of the seller's duty to tender a reasonable contract of carriage and the cargo of or damage to the goods sold, the prevailing view is that damages may be claimed under this proviso only if a causative link is proved. See further M. Bridge, *The International Sale of Goods* (3rd edn, OUP, 2013), § 7.52 and L. Gullifer, 'Risk', published as Chapter 3 in E. McKendrick (ed.), *Sale of Goods*, (LLP, 2000), § 3–027.

60 Contrary to the presumptive position. Under SGA, s. 31(1), delivery of the goods to a carrier for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

61 SGA, s. 51. See further M. Bridge, *The International Sale of Goods* (3rd edn, OUP, 2013), §7.52; and the chapter by L. Gullifer referred to at note 59 above, §3–027. For the position under the CISG, see arts. 25, 32(2) and 70, also providing for the retrospective reversion of risk.

62 For a simple breach of the obligation in SGA, s.32(2).

63 General statements as to the arrival of the goods will not be construed as imposing a duty on the seller to deliver the goods at a specific time. Such an obligation will arise only if there are clear words to the effect in the contract of sale. *P&O Oil Trading Ltd v Scanoil AB (The Orient Prince)* [1985] 1 Lloyd's Rep 389, 392–393 (Webster J); *Cargill v B Bangladesh Sugar & Food Industries*, [1998] 1 WLR 461, 465 (see in particular clause 16 in the contract of sale examined in this case). On delivery clauses, see further *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell, 2014), § 19–075 and M. Bridge, *The International Sale of Goods* (3rd edn, OUP, 2013), § 4.144.

reduced speed, the buyers will be entitled to reject the goods or sue for damages.⁶⁴ Although there is no authority, it is suggested that in any case, a buyer suffering loss due to shipment under an unreasonably slow contract of carriage (including damages arising out of late delivery) may well have a remedy, either on the basis that the reference in s. 32(2) to buyers' right to complain of deterioration or loss of the goods is not exclusive of other remedies such as his right to claim an analogous remedy in the case of late receipt owing to the unreasonableness of the contract of carriage,⁶⁵ or for breach of a parallel implied term requiring shipment such that in the ordinary course of events the goods will arrive within a reasonable time.⁶⁶

2.3 Bills of lading allowing for slow steaming: a good tender?

Procuring a reasonable contract of carriage under SGA, s. 32(2) alone will not discharge a CIF or FOB seller's⁶⁷ obligation to make the proper arrangements for the transportation of the goods sold to the agreed destination. Contracts of this kind also impose on sellers the duty to tender a conforming bill of lading, namely a bill which is not only reasonable and customary in the trade in question⁶⁸ but also consistent with the terms of the contract of sale.⁶⁹ Although they are two distinct duties with different consequences if breached, the duty to provide a reasonable contract is closely interlinked with the obligation to tender a proper bill of lading, as failure to comply with s. 32(2) is likely to go hand in hand with the seller's obligation to procure a conforming bill of lading.

It is therefore suggested that, analogously with what amounts to a reasonable contract under s. 32(2), a bill of lading containing a slow steaming clause will amount to proper fulfilment of the contract of sale only if slow steaming is a

64 *Nova Petroleum International Establishment v Tricon Trading Ltd* [1989] 1 Lloyd's Rep 312, 315 (Evans J). The buyers may also bring a claim for the tender of a non-conforming bill of lading. See the discussion below in subchapter 3.

65 SGA, s. 62(2); See further M. Bridge, *The International Sale of Goods* (3rd edn, OUP, 2013), § 4.07.

66 Such an implied term is deemed necessary in order to give the contract of sale commercial efficacy. A similar point was raised in the context of deviation in *Cremer v Brinker's*, but no decision was taken as Mocatta J found for the buyers on another ground in *Peter Cremer GmbH & Co v Brinkers' Groudstoffen BV* [1980] 2 Lloyd's Rep 605, 607–608.

67 With the exception of the third FOB type where the buyer uses its own forwarding agent to book space and procure a bill of lading. See *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, 424 (Devlin J).

68 *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743, 757 (Hamilton LJ) (FOB contract: 'upon the terms of a reasonable and ordinary bill of lading'); *Shipton, Anderson & Co v John Weston & Co* (1922) 10 Ll L Rep 762, 763 (Greer J) (CIF contract: 'usual and proper shipping documents called for by their contract of sale'); *Ranson (TW) Ltd v Manufacture d'Engrais et de Produits Industriels* (1922) 13 Ll L Rep 205, 205 (Greer J) (CIF contract: 'usual bill of lading in this trade'); *Finska Cellulosaforenningen (Finnish Cellulose Union) v Westfield Paper Co Ltd* [1940] 4 All ER 473, 478, 68 Ll L Rep 75, 81 (Viscount Caldecote CJ) (CIF contract: 'in a form usual or current in the trade'); *Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress)* (No. 2) [1996] 2 Lloyd's Rep 319, 328 (Rix J) (CFR: a form which is 'reasonable and acceptable in the trade' or 'usual and customary').

69 *Burstall v Grimsdale* (1906) 11 Com Cas 280, 290 (Kennedy J); *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398, 401–402 (Mance J).

well-known custom of practice or usage in the trade of the particular goods.⁷⁰ This is a question of fact or commercial usage⁷¹ to be judged at the time the goods were shipped and the bill of lading was procured.⁷² Additionally, the tendered bill of lading must be reasonable⁷³ in that it must provide for all necessary precautions to preserve the goods sold during the protracted time spent at sea,⁷⁴ including for example advanced temperature and atmosphere control systems to be employed in the carriage of perishable goods or the taking of the required preventive measures to protect the cargo from piracy, as discussed earlier in the context of SGA, s. 32(2).

Nonetheless, a usual and proper bill of lading providing for slow steaming will only qualify as a conforming document if it is also consistent with the terms of the sale contract.⁷⁵ For example, such a bill of lading will not be a due performance of the contract of sale, if a customary liberty to slow steam is in conflict with a delivery clause in the contract of sale or the 'CIF delivered' terms of the contract of sale.⁷⁶ This will occur in cases where it is estimated that the vessel will not arrive at the port of discharge by the agreed date if she sails at a lower speed. It is submitted that the tender of such a bill will amount to breach of the sales contract irrespective of whether (or not) the vessel in fact proceeded with reduced speed to the port of discharge.⁷⁷ This is because CIF and FOB buyers (or their bankers), who are under an obligation to accept or reject the tendered bill of lading 'promptly', would not know normally at the time of the tender of the bill whether (or not) the vessel has actually slow steamed on her way to the port of discharge.⁷⁸

At this juncture, it is also worth mentioning that a clause subjecting the sales contract to the terms of a charterparty, which permits sailing at reduced speed, will not necessarily make a bill of lading providing for slow steaming a conforming document.⁷⁹ In particular, such an incorporation clause will be construed as integrating the slow steaming clause in the contract of sale only if the practice of proceeding

70 See the test articulated by Kennedy J in *Burstall v Grimsdale*, note 69 above.

71 *Burstall v Grimsdale*, note 69 above; *Finska Cellulosaforeningen (Finnish Cellulose Union) v Westfield Paper Co Ltd* [1940] 4 All ER 473, 478, (1940) 68 Ll L Rep 75, 81 (Viscount Caldecote CJ).

72 *Finska Cellulosaforeningen v Westfield Paper*, note 71 above, [1940] 4 All ER 473, 479, (1940) 68 Ll L Rep 75, 82.

73 *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743, 757 (Hamilton LJ), making reference to a 'reasonable' bill of lading.

74 This requirement is not discussed in the context of bills of lading but is consistent with the reasonableness test in *Gatoil International Inc v Tradax Petroleum Ltd (The Rio Sun)* [1985] 1 Lloyd's Rep 350, 360 (Rix J).

75 *Burstall v Grimsdale* (1906) 11 Com Cas 280, 290 (Kennedy J); *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398, 401–402 (Mance J).

76 See the cases referred to in note 63 above. See also BIMCO Slow Steaming Clause for Time Charterparties, sub-clause (b)(ii), which makes slow steaming subject to the specified time of arrival at the particular destination.

77 By analogy to the discussion on deviation clauses in *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell, 2014), § 19–033.

78 *Hansson v Hamel & Horley Ltd* [1922] 2 AC 36, 45 (Sumner LJ). See also *Benjamin's Sale of Goods*, note 77 above.

79 See *Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress) (No. 2)* [1996] 2 Lloyd's Rep 319, 321, making the contract of sale subject to the 'terms, condition and exceptions as per Charterparty'.

at reduced speed is usual or reasonable in the trade in question.⁸⁰ This practically means that a CIF or FOB seller cannot rely on the incorporation clause in the contract of sale to establish that a tendered bill of lading containing a slow steaming clause unusual in the carriage of goods sold is good tender, as the slow steaming clause would not be deemed incorporated in the sale contract.

If, for any of the reasons discussed above, a bill of lading providing for slow steaming is not a conforming document, then the buyers are entitled to reject it, as strict compliance with documentary requirements is a condition precedent to the buyer's obligation to take up the bill of lading and other related documents.⁸¹

2.4 Slow steaming and time of shipment/laycan

2.4.1 CIF contracts

The performance of a CIF contract is a complex task which requires *inter alia* putting in place logistical arrangements aiming at avoiding not only unnecessary storage expenses near or at the port of shipment but also the payment of demurrage or hire charges while the vessel is waiting at berth for goods not yet ready for shipment. The importance of time stipulations in international sales contracts, including that of shipment, has therefore been stressed by the courts on several occasions.⁸²

The starting point in CIF contracts is that sellers bear the obligation to ship the contracted goods within the stipulated shipment period or, if no such shipment period is specified in the contract of sale, within a reasonable time⁸³ under the circumstances existing at the time in question.⁸⁴ CIF sellers will thus fulfil their obligation only if the chartered vessel arrives at the port in good time to complete loading within the shipment period (or reasonable time).⁸⁵ Hence, if the charter-party for the carriage of the goods sold includes a slow steaming clause, CIF sellers

80 *The Northern Progress*, note 79 above, 328–331 (special diversion clause).

81 *Ranson (TW) Ltd v Manufacture d'Engrais et de Produits Industriels* (1922) 13 Ll L Rep 205, 205 (Greer J); *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398, 402–403 (Mance J); *Yelo v SM Machado & Co Ltd* [1952] 1 Lloyd's Rep 183, 192 (Sellers J); *Concordia Trading BV v Richco International Ltd* [1991] 1 Lloyd's Rep 475, 478–479 (Evans J), holding that the duty imposed on the FOB seller should be to the same effect as that established in CIF sales.

82 See for example, *Bowes v Shand* (1876–77) LR 2 App Cas 455.

83 SGA, s. 29(3); *Bowes v Shand*, note 82 above, 474 (Lord Hatherly); *Landauer & Co v Craven & Speeding Bros* [1912] 2 KB 94, 105 (Scrutton J); *Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd* [1969] 1 Lloyd's Rep 17, 28 (Browne J); *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc (The Azur Gaz)* [2005] EWHC 2528, [2006] 1 Lloyd's Rep 163, [23] (Clarke J). See also Incoterms 2010, CFR and CIF A4 making reference to 'the agreed date or within the agreed period' and CISG, art. 33 providing for delivery of the goods to the carrier within the 'fixed by or determinable from the contract' time or period, or 'in any other case, within a reasonable time after the conclusion of the contract'.

84 *Hick v Raymond* [1893] AC 22, 29 (Lord Herschell LC).

85 The CIF sellers are normally entitled to the whole of the shipment period to perform the contract: see *Re Anglo-Russian Merchant Traders and John Batt & Co (London) Ltd* [1917] 2 KB 679, 688 (Viscount Reading CJ).

need to ensure that the vessel will arrive on time to load even if she slow steams on her way to the port of loading. To that end, as means of pressurising the ship-owners, CIF sellers should instruct them as to the chartered vessel's expected arrival at the port of loading.⁸⁶ In such a case, if the master fails to exercise due diligence to comply with such instructions when slow steaming and as a result, the vessel arrives late at the port of loading, the CIF sellers will be entitled to sue the owners for any loss suffered as a result of their non-compliance with their utmost despatch obligation.⁸⁷ It should be also noted, though, that such rights will not be granted to voyage charterers, as the owners' compliance with the utmost despatch obligation is not dependent upon the charterers' instructions as to the vessel's agreed time of arrival at the loading port.

However, such charterparty clauses have a limited scope, as they only provide CIF sellers with rights against the owners of the chartered vessel. They leave entirely CIF sellers' liabilities to their own buyers, arising out of their failure to observe their duty to ship the goods in time. This is a presumptively vital obligation whose breach allows the CIF buyers not only to claim damages but also to reject the shipment,⁸⁸ either at the stage of tender of documents⁸⁹ or that of tender of the goods themselves.⁹⁰ It has to be remembered that these two rights of rejection are regarded as two 'separate and successive rights' which arise at different moments in time: the right to reject the documents can only be invoked after tender of documents, while the right to reject the goods becomes exercisable when the goods are tendered and after examination they are found to be non-conforming.⁹¹

86 BIMCO Slow Steaming Clause for Time Charter Parties, sub-clause (b) (ii).

87 *Ibid.*, sub-clause (e).

88 *Bowes v Shand* (1876–77) LR 2 App Cas 455, 468 (Lord Cairns LC), 480–481 (Lord Blackburn); *Ashmore & Son v C.S. Cox & Co* [1899] 1 QB 436, 441 (Lord Killowen CJ); *J Aron & Co Inc v Comptoir Wégimont SA* [1921] 3 KB 435, 440–441, (1921) 8 Ll L Rep 236, 237–238 (McCardie J).

89 *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398, 402–403 (Mance J). The late arrival of the vessel at the port of loading due to slow steaming will make impossible to tender a bill of lading which conforms with the contract, i.e. such a bill will either record the shipment of the goods outside the agreed period or reasonable time or will not be genuine if falsely stating the shipment of the goods sold within the stipulated period: *Re General Trading Co and Van Stolk's Commissiehandel* (1911) 16 Com Cas 95 (bill of lading referring to shipment outside the shipment period); *James Finlay and Co Ltd v N.V. Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400, 412–413 (Greer LJ), 416 (Sankey LJ), (1928) 32 Ll L Rep 245, 251–252 (Greer LJ), 254 (Sankey LJ); *Kwei Tek Chao (v/a Zung Fu Co) v British Traders & Shippers Ltd* [1954] 2 QB 459, 481, [1954] 1 Lloyd's Rep 16, 48 (Devlin J) (falsely dated bill of lading).

90 The rejection of the goods will be based on their non-conformity with the contract description as they were not put on board the vessel within the stipulated period. *Bowes v Shand*, (1876–77) LR 2 App Cas 455, 468 (Lord Cairns LC), 480–481 (Lord Blackburn); *Kwei Tek v British Traders & Shippers Ltd*, note 89 above, [1954] 2 QB 459, 480, [1954] 1 Lloyd's Rep 16, 48.

91 *Kwei Tek Chao v British Traders Ltd*, note 89 above, [1954] 2 QB 459, 480–482, [1954] 1 Lloyd's Rep 16, 48–49; *Gill & Duffus SA v Berger & Co Inc* [1984] AC 382, 395, [1984] 1 Lloyd's Rep 227, 234 (Lord Diplock). For the loss of both rights to reject when CIF buyers accept a bill of lading referring to a date outside the shipment period, see *Kwei Tek v British Traders*, *ibid.*, [1954] 2 QB 459, 481, [1954] 1 Lloyd's Rep 16, 49. On the right of rejection generally, see further G. Treitel, 'Rights of Rejection under c.i.f sales', *Lloyd's Maritime and Commercial Law Quarterly* 565 [1984].

2.4.2 FOB contracts

In contrast with CIF contracts, the duty to select the carrier and make the necessary shipping arrangement generally falls on FOB buyers.⁹² Due performance of this obligation entails *inter alia* the nomination and tender of a vessel at such a time within the agreed shipment period that the shipment of purchased goods can be completed at or before the expiry of that period.⁹³ Alternatively, in cases where the sales contract contains a laycan to lift the goods⁹⁴ instead of a provision of time of shipment,⁹⁵ FOB buyers will fulfil their shipping obligation only if the vessel arrives at the port of loading and serves a notice of readiness to load before the agreed cancelling date.⁹⁶ Hence, if the charterparty for the carriage of goods sold allows for slow steaming, FOB buyers will comply with such a duty only if the vessel proceeds at such (reduced) speed that will allow her to arrive at the loading port before the end of the laycan period or in sufficient time to complete loading within the agreed shipment period, whichever the case is.

If, however, the nominated vessel, which sailed to the port of loading at a slower speed, fails to arrive on time to meet the shipment period or the last day of the laycan spread, FOB buyers will be guilty of breach of their sales contract. The seriousness of the consequences of their breach will depend on whether the parties have agreed to a shipment or a laycan period. On the one hand, as the time of shipment is of essence and therefore the shipment period is classified as a condition of the contract of sales, FOB sellers may rescind the contract, refuse to load and sue for damages.⁹⁷ Similarly, if the vessel arrives within the shipment period but not in sufficient time to complete loading before the end of such a period, the FOB sellers' obligation to put the goods on board the nominated vessel ceases on expiration of the shipment period, even though the shipment of the goods is not complete.⁹⁸

On the other hand, the arrival of the vessel after the cancelling date due to slow steaming will entitle FOB sellers to only cancel the sales contract without any right

⁹² With the exception of the second type of FOB contracts. See *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, 424 (Devlin J).

⁹³ *Bunge & Co v Tradax England Ltd* [1975] 2 Lloyd's Rep 235, 239 (Donaldson J).

⁹⁴ Laycan is a term borrowed from charterparty practice, where it means the time period between the earliest day upon which an owner can expect his charterer to load and the latest day upon which the vessel can arrive at its appointed loading place without being at risk of being cancelled (*Tidebrook Maritime Corporation v Vitol SA of Geneva (The Front Commander)* [2006] EWCA 944, [2006] 2 Lloyd's Rep 251, [38] (Rix LJ)).

⁹⁵ The term laycan is normally used in FOB contracts and very rarely in CIF sales. For the confusion caused when such a clause is incorporated in a CIF contract, see *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc (The Azur Gaz)* [2005] EWHC 2528, [2006] 1 Lloyd's Rep 163. See also *Galaxy Energy International Ltd v Murco Petroleum Ltd (The Seacrown)* [2013] EWHC 3720, [2013] 2 CLC 1007, [23]–[25] (John Mackie QC), arising out of a dispute over whether a term in a FOB contract was a laycan clause or a delivery provision setting out the latest date of delivery.

⁹⁶ *ERG Raffinerie Mediterranee SpA v Chevron USA Inc (The Luxmar)* [2007] EWCA 494, [2007] 2 Lloyd's Rep 542, [17]–[18] (Longmore LJ).

⁹⁷ *Olearia Tirrena SpA v NV Algemeene Oliehandel (The Osterbek)* [1973] 2 Lloyd's Rep 87, 87–88 (Denning MR), affirming [1972] 2 Lloyd's Rep 341.

⁹⁸ *Bunge & Co v Tradax England Ltd* [1975] 2 Lloyd's Rep 235, 239 (Donaldson J).

to claim damages for non-performance.⁹⁹ As is also the case in charterparties, the laycan provision does not place an absolute obligation on FOB buyers to get the vessel at the port of loading by the cancelling date.¹⁰⁰ Therefore, the sole effect of the laycan provision is to give FOB sellers an option to terminate the contract of sale, which, absent such a cancelling clause, they would not have been allowed to do so.¹⁰¹ Although not yet addressed by the courts in the context of FOB sales, it is arguable that the laycan provision imposes on FOB buyers an implied duty to use reasonable diligence to deliver the ship before the expiration of the laycan period.¹⁰² For example, FOB buyers will fulfil this obligation if they instruct the owners of the expected time of arrival at the port of loading under the terms of the BIMCO Slow Steaming Clause for Time Charter Parties, sub-clause (b)(ii).

In addition to contractual solutions designed to add flexibility to the performance of the FOB buyers' duty to tender a suitable vessel on time, which will be discussed in the next sub-chapter, FOB sellers may avoid the breach of their time of shipment obligation by simply making a substitute nomination. Hence, once they become aware that the nominated vessel will not be capable of loading within the stipulated time or will not meet the laycan period because it has slow steamed on her way to the port of loading, FOB buyers may cancel the nomination and substitute another ship to load the goods sold. This right may be exercised only if the contract of sales does not prohibit the new nomination and the substitute vessel is provided within such a time as to make it possible for her to reach the port of loading in sufficient time to enable the FOB sellers to put the goods on board the vessel within the shipment period¹⁰³ or before the last day of the laycan period.

2.5 Contractual solutions allowing for flexibility

The above discussion has demonstrated the importance of the time of shipment in CIF and FOB contracts, as well as the difficulties that may arise if slow steaming prevents the vessel from arriving at the port of loading on time to put the merchandise on board. Depending on the nature of the goods and the circumstances

99 *ERG Raffinerie Mediterranee SpA v Chevron USA Inc (The Luxmar)* [2007] EWCA 494, [2007] 2 Lloyd's Rep 542, [17]–[18] (Longmore LJ). See also *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc (The Azur Gaz)* [2005] EWHC 2528, [2006] 1 Lloyd's Rep 163, [9] (Clarke J). Also, it should be noted the right of cancellation could not be validly exercised until the arrival of the cancellation date, even when FOB sellers know in advance that the vessel will not arrive on time. Any premature notice purporting to cancel the contract constitutes an anticipatory breach and repudiation of the sales contract. *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164, 201 (Edmund Davies LJ), 207–208 (Megaw LJ), [1970] 2 Lloyd's Rep 43, 52 (Edmund Davies LJ), 56 (Megaw LJ), approving *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines (The Madeleine)* [1967] 2 Lloyd's Rep 224.

100 *Marbienes Compania Naviera SA v Ferrosstaal AG (The Democritos)* [1976] 2 Lloyd's Rep 149, 152 (Lord Denning MR).

101 *ERG Raffinerie Mediterranee SpA v Chevron USA Inc (The Luxmar)* [2007] EWCA 494, [2007] 2 Lloyd's Rep 542, [18], [20] (Longmore LJ). See also *Smith v Dart & Son* (1884) 14 QBD 105, 110 (Smith J) and *The Democritos*, note 100 above.

102 By analogy to *The Democritos*, note 100 above.

103 *Agricultores Federados Argentinos Sociedad Cooperativa v Ampro SA Commerciale, Industrielle et Financiere* [1965] 2 Lloyd's Rep 157, 167 (Widgery J).

of the case, though, the parties to the sales contract may take steps to add flexibility to their shipping arrangements, as the case may be for instance in the sale of commodities. Therefore, it is worth considering possible contractual solutions allowing the parties to the contract of sales to extend the shipment period or the laycan period in cases of slow steaming, in order to evade the consequences of the late arrival of the vessel at the port of loading.

One way of softening the FOB buyer's obligation related to the time of shipment, which may be breached if the vessel slow steams, is to include a term in the FOB contract placing an obligation on sellers to complete loading even after the expiry of the shipment period if the nominated vessel has presented herself in readiness to load within the contract period but not in sufficient time to allow for the completion of delivery of the cargo on board within the stipulated period.¹⁰⁴ Such a clause will operate as a waiver of the FOB sellers' right to cease loading at the end of the shipment period,¹⁰⁵ and therefore sellers will not be entitled to rescind the contract and refuse to ship the goods after that period has expired. The extension of the shipment period under such clauses is usually automatic upon arrival of the vessel within the shipment period and does not require any formalities to be observed by the parties, such as a notice of extension. Whether, however, the payment of carrying charges will be also waived depends on the wording of the pertinent clause.¹⁰⁶

Furthermore, parties to international sales contracts may also incorporate into their CIF or FOB contract another clause to prolong the agreed time of shipment. Such a clause, which is rather common in the commodities trade,¹⁰⁷ will confer on CIF sellers or FOB buyers the right to extend the shipment period usually for a certain time¹⁰⁸ in cases where the vessel arrives at the port of loading outside the agreed period. Such a clause will serve as a waiver of the CIF buyers

104 See for example The Grain and Feed Trade Association (GAFTA) 119, cl. 6 and GAFTA 120, cl. 6, stating that: 'Provided the vessel is presented at the loading port in readiness to load within the delivery period, Sellers shall if necessary complete loading after the delivery period and carrying charges shall not apply.'

See also *Cie Commerciale Sucres et Denrees v C Czarnikow Ltd (The Naxos)* [1990] 1 WLR 1337, [1991] 1 Lloyd's Rep 29, examining Federation of Oils, Seeds and Fats Associations (FOSFA), r. 14(4) and *Cereal Investments Co (Cic) SA v ED & F Man Sugar Ltd* [2007] EWHC 2843, [2008] 1 Lloyd's Rep 355 considering Refined Sugar Association (RSA), r. 7.

105 On the FOB seller's right to stop the loading process when the shipment period ends, see *Bunge & Co v Tradax England Ltd* [1975] 2 Lloyd's Rep 235, 239 (Donaldson J).

106 See for example GAFTA 119, cl. 6 and GAFTA 120, cl. 6 expressly excluding the payment of carrying charges.

107 See for instance, GAFTA 119, cl. 9 (FOB-Feedingstuffs-General) and GAFTA 80, cl. 10 (CIF-EU Grain). GAFTA 120, cl. 7 (Thai rice), for example, provides this:

EXTENSION OF DELIVERY

The contract period of delivery shall be extended by an additional period of not more than 21 consecutive days, provided that Buyers serve notice claiming extension not later than the next business day following the last day of the delivery period. In this event Sellers shall carry the goods for Buyers' account and all charges for storage, interest, insurance and other such normal carrying expenses shall be for Buyers' account, unless the vessel presents in readiness to load within the contractual delivery period.

108 See the clauses above.

right to reject the goods or the documents¹⁰⁹ or the CIF sellers' right to rescind the sales contract. Therefore, it should be construed strictly in that it will only be triggered if all the preconditions set out in its terms are met.¹¹⁰

CIF sellers and FOB buyers will thus be entitled to invoke an extension of shipment clause included in their contract only if the specific event causing the vessel's delayed arrival at the port of loading falls into the scope of the extension clause.¹¹¹ In that sense, whether delay in shipment caused by slow steaming will be covered depends on the wording of the particular clause. No doubt that slow steaming complies with the terms of widely drafted extension clauses which set out an unqualified right to extend the delivery period.¹¹² Slow steaming will not, however, classify as a qualifying event if the pertinent extension of shipment clause makes reference to specific reasons of delay, such as force majeure¹¹³ or strikes.¹¹⁴

In addition, unlike the contract terms applying to vessels arriving within the shipment period, CIF sellers or FOB buyers may rely on a particular extension clause which covers slow steaming only if they also follow the formalities set out in the clause in question. Extension clauses would normally impose an obligation on CIF sellers or FOB buyers to serve a clear and unconditional notice evincing the interested party's intention to extend the shipment period¹¹⁵ by a particular date, which in some clauses coincides with the next business day following the last day of the originally stipulated period.¹¹⁶ CIF sellers and FOB buyers are also required to pay a price for invoking the extension which will take the form of a daily reduction from the contract price in CIF sales¹¹⁷ or carrying charges or a daily rate based upon the agreed price of the goods, in case of FOB contracts.¹¹⁸

109 *Bowes v Shand*, (1876–77) LR 2 App Cas 455, 468 (Lord Cairns LC), 480–481 (Lord Blackburn); *James Finlay and Co Ltd v N.V. Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400, 412–413 (Greer LJ), 416 (Sankey LJ), (1928) 32 Ll L Rep 245, 251–252 (Greer LJ), 254 (Sankey LJ); *Kwei Tek Chao (t/a Zung Fu Co) v British Traders & Shippers Ltd* [1954] 2 QB 459, 480–481, [1954] 1 Lloyd's Rep 16, 48 (Devlin J); *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398, 402–403 (Mance J).

110 See for example *Berg (V) & Son v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep 499; *Huilerie L'Abeille v Societe des Huileries du Niger (The Kastellon)* [1978] 2 Lloyd's Rep 203; *PEC Ltd v Thai Maparn Trading Co Ltd* [2011] EWHC 3306, [2012] 1 Lloyd's Rep 295.

111 See for example *The Kastellon*, note 110 above, 206 (Donaldson J).

112 See to that effect the clause in *Nidera BV v Venus International Free Zone for Trading & Marine Services SAE* [2014] EWHC 2013, [2014] 2 Lloyd's Rep 425 on GAFTA, 49, cl. 8, which has the same wording as other GAFTA clauses such as GAFTA 80, cl. 10 (CIF) or GAFTA 119, cl. 9 (FOB).

113 See for example FOSFA 54, cl. 15 (considered in *Huilerie L'Abeille v Societe des Huileries du Niger (The Kastellon)* [1978] 2 Lloyd's Rep 203). See also the force majeure clause discussed in *Berg (V) & Son v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep 499.

114 See for instance, FOSFA 54, cl. 15 and London Corn Trade Association contract (LCTA), 30, cl. 20.1 (discussed in *Koninklijke Bunge v Compagnie Continentale d'Importation* [1973] 2 Lloyd's Rep 44).

115 A notice of conditional extension, e.g. a notice stating that the buyers were 'ready' to extend the delivery period (not that they were doing so) will not will be deemed sufficient or valid. See *PEC Ltd v Thai Maparn Trading Co Ltd* [2011] EWHC 3306 (Comm), [2012] 1 Lloyd's Rep 29, [18] (Hamblen J).

116 See for example GAFTA 119, cl. 9 and GAFTA 120, cl. 7.

117 See for example GAFTA 80, cl. 10.

118 See for example GAFTA 119, cl. 9 and GAFTA 202, cl. 10. See *Thomas P Gonzalez Corp v FRWaring (International) Pty Ltd* [1980] 2 Lloyd's Rep 160 holding that such charges do not amount to a penalty.

Alternatively, if the sales contract stipulates a laycan spread, it is submitted that parties to FOB contracts should negotiate a flexible clause which provides for the possibility of extending the cancelling date, especially if slow steaming is usual in the trade in question. Such an extension clause, which is common in charterparties,¹¹⁹ will grant FOB buyers the right to propose a new cancelling date to their sellers usually in reasonable time before the last date of laycan to enable sellers to re-arrange the transportation of the goods to the port of loading and, thus, avoid unnecessary storage expenses. To allow the parties to make alternative arrangements, the clause should also impose on FOB sellers the obligation to notify buyers of their decision to accept the proposed date as the new cancelling date or cancel the sales contract by an agreed deadline. Otherwise, the default position will be that their failure to respond amounts to an acceptance of the new cancelling date.

Mitigating thus the severity of the consequences of the breach of the time of shipment obligation by adding flexibility to international sales contracts is a matter of carefully drafting the terms of the pertinent sales contract. Therefore, it is suggested that the trade industry and, in particular, organisations such as GAFTA or FOSFA, should consider drafting tailor-made clauses allowing the extension of a shipment or laycan period in trades where slow steaming has become common practice, with the view to avoiding situations where CIF sellers or FOB buyers will not be allowed to invoke an extension clause because of its limited scope.

2.6 Conclusions

Slow steaming has now become a widespread practice in transportation contracts as means of accommodating the shipping industry's interests and, in particular, the sector's need to reduce fuel consumption and CO₂ (and other) emissions and to improve the fundamental supply-demand imbalance in shipping arising out of the global financial crisis. Slow steaming practices are usually subject to the BIMCO slow steaming clauses, which are commonly incorporated in charterparty contracts and bills of lading issued under them.

As international trade largely depends on maritime transportation, it was natural for this work to consider the impact of slow steaming clauses on international trade. In particular, this chapter explored the interrelationship between international sales agreements, such as CIF and FOB sales, and slow steaming clauses as integrated in charterparty and bill of lading contracts for the carriage of goods sold, with a view to examining how such clauses may affect the buyers' and sellers' respective rights and obligations.

This chapter first considered the CIF/FOB sellers' obligation to procure a reasonable contract of affreightment under SGA, s. 32(2) to conclude that carriage contracts providing for slow steaming will not always meet the reasonableness test set out in s. 32(2). To be specific, the above analysis has established that CIF/FOB sellers will fulfil their s. 32(2) obligation only if the concluded contract of carriage

¹¹⁹ See for instance NYPE 93, cl. 16 and BIMCO GENCON 94, cl. 9 (b).

providing for a slow steaming clause is usual in the particular trade, as well as appropriate for the carriage of goods sold throughout the prolonged voyage by sea. The discussion then went on to apply this test to contracts for the carriage of perishable goods, as well as to contracts of affreightment providing for transit through a piratical area. In both cases, it was concluded that even if slow steaming is customary in the trade in question, a contract of carriage allowing for slow steaming will be deemed reasonable for the purposes of s. 32(2) only if it also provides for the necessary precautions to offset the possible adverse impact of slow steaming. In the case of perishable goods, this duty will be met if any suitable temperature and atmosphere control system is adopted, while for the transit through a piratical area, it was argued that such measures include sailing at least at the minimum speed recommended by the BMP4 but not the employment of armed guards on board the vessel.

This work next explored the interrelationship between slow steaming clauses incorporated in bills of lading and the CIF/FOB sellers' duty to tender a bill of lading which is reasonable and customary in the trade, and which is also consistent with the terms of the contract of sale. The analysis of the first precondition did not present great difficulty, as the same principles discussed in the context of SGA, s. 32(2) applied. Therefore, the discussion focused on the requirement of the conformity of the bill of lading with the terms of the international sales contract, which will come into play in 'CIF delivered' contacts. The argument put forward was that, by analogy to deviation clauses, a bill of lading allowing for slow steaming will constitute a bad tender irrespective of whether the liberty to slow steam was in fact exercised during the voyage to the port of discharge, if it is estimated that sailing at lower speed will prevent the arrival of the vessel at the port of discharge by the agreed date.

Last but not least, the discussion turned to the possible impact of slow steaming on the time of shipment and laycan, as stipulated in the sales contract. The analysis demonstrated that if the charterparty for the carriage of goods sold allows for slow steaming, CIF sellers and FOB buyers will meet the agreed shipment or laycan period only if the vessel sails to the port of loading at such (reduced) speed that will enable her to reach the loading port before the last day of laycan, or in sufficient time to complete loading within the agreed (or reasonable) shipment period, whichever the case is.

The above analysis has thus established on several occasions that, although slow steaming is widely adopted in shipping, slow steaming clauses are not always in harmony with the obligations imposed on the parties to CIF and FOB sales contracts. To facilitate a 'successful marriage' between slow steaming practices and international trade which is essential for the due performance of international sales contracts, this chapter has gone a step further to propose contractual solutions aiming at mitigating the serious consequences of the breach of the time of shipment and laycan provisions. Specifically, this chapter recommended that international trade associations, such as GAFTA and FOSFA, draft and incorporate tailor-made clauses into their standardised contracts setting out the interested party's (CIF seller or FOB buyer) right to extend the shipment or laycan period in case of (customary) slow steaming. In the meantime, the parties to CIF and

FOB contracts should be more proactive when negotiating the terms of their sales contracts and include an extension of a shipment or laycan clause that covers slow steaming, if again such practice is usual in their trade. Such clauses will prevent situations where CIF sellers or FOB buyers will find themselves in breach of their sales contract because the standardised extension clause in their contract does not cover slow steaming.

CHAPTER 3

Laytime and demurrage in CIF and FOB contracts

*Professor Simon Baughen**

Laytime and demurrage provisions are not the exclusive province of voyage charters. They also frequently appear in contracts of sale. The CIF seller or FOB buyer who charters a vessel to fulfil its obligations under the sale contract will want to find a way to ensure that any demurrage incurred under the charter can be passed on to its counterparty under the contract of sale. This may be achieved in three ways. First, the sale contract may have its own self-contained laytime and demurrage code with no reference to any charterparty. Second, the sale contract may have its own laytime provisions but incorporate the demurrage provisions of a charterparty. Third, the sale contract may incorporate both the laytime and demurrage provisions of a charterparty.

However, voyage charterparties and sale contracts are rather different contracts, and the incorporation of provisions from the former may not always fit comfortably with the structure of the latter. In CIF and FOB sales contracts, a delivery period will be agreed within which the seller must complete loading. This obligation is a condition. As regards discharge, this will not concern the FOB seller whose obligations under the contract will be fulfilled with the shipment of the cargo within the delivery period. It is also unlikely that the CIF seller will have any obligation in respect to the discharge of the vessel. In contrast, the obligations as regards loading and discharging under a voyage charter are such that on completion of the approach and carrying voyages, the charterer is to load and discharge the full cargo specified in the charter within the agreed laytime. Compensation for breach of this obligation, which by contrast is an innominate term rather than a condition, is exclusively by way of the demurrage provisions in the charter.

In this paper, I shall consider the interaction between these two types of contract to see how laytime and demurrage provisions operate in their new home in sales contracts and, conversely, whether the construction of laytime and demurrage provisions in sale contracts can throw any light on laytime and demurrage issues arising under voyage charters.

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3.1 Loss of time: the default position in CIF and FOB contracts

I shall start by examining the default position under contracts of sale in respect of the CIF buyer's obligations as regards the time taken to discharge the vessel and the FOB seller's obligations in respect of the time taken to load it. With a CIF contract it is doubtful if there is any implied duty on a buyer to discharge the cargo, let alone to discharge within a reasonable time. In *Congimex SarL v Tradax Export SA*¹ an issue arose as to whether a contract was frustrated by a change in Portuguese law in 1975 whereby the buyers were no longer able to obtain the permit necessary for import of the goods, on the basis that part of the contractual performance fell to be performed in Portugal and had become illegal.

Staughton J held that the buyers were under no obligation as regards discharge, stating:

The obligation of a c.i.f. seller is either to ship goods himself to the contractual destination or to obtain a bill of lading from someone else who has shipped them and to tender it with other appropriate documents to the buyer. The obligation of the buyer is to take up and pay for the documents. Neither party is under any obligation to the other relating to the discharge of the goods. Neither is bound to discharge them or procure them to be discharged. That is something which is done by arrangement between the buyer and the shipowner after the c.i.f. contract has been fully performed, assuming (which is not always the case) that the documents have been taken up and paid for before the ship arrives.²

With an FOB contract, both buyer and seller will have obligations regarding the shipment of the cargo. The seller must complete shipment of the goods on board the ship nominated by the buyer within the delivery period specified by the contract. This obligation is a condition, and failure to complete shipment within the delivery period will entitle the buyer to reject the goods or to affirm the contract and claim damages for loss caused by the delay. In turn, the FOB buyer must give proper shipping instructions, so that the nominated vessel will be ready to start loading in time to enable loading to be completed within the delivery period. If this is not the case, the seller is not obliged to continue loading beyond the delivery period.³ If the buyer has the option as to the time of shipment, the seller must ship within a reasonable time of receiving shipping instructions from the buyer, but the seller is only obliged to commence loading once the vessel is in berth, and this obligation is not a condition.⁴

1 [1981] 2 Lloyd's Rep 687.

2 At 691. However, such an obligation is now included in B4 of Incoterms 2000 and 2010: the buyer "must accept delivery of the goods when they have been delivered in accordance with A4 and receive them from the carrier at the named port of destination".

3 *Bunge & Co Ltd v Tradax England Ltd* [1975] 2 Lloyd's Rep 235. The seller's obligation is to start shipping as soon as the vessel is tendered and to continue to do so in accordance with the custom of the port, but ceases at the end of the shipment period.

4 It can be made one by the terms of the contract: see, e.g. the facts of *The Naxos* [1990] 1 WLR 1337, in which cl. 14(1) provided "In cases of . . . (f.o.b. stowed) contracts the Seller shall have the sugar ready to be delivered to the Buyer at any time within the contract period . . ."

There is no implied obligation to load within such time as to avoid the buyer incurring a liability for demurrage under its charterparty. There may be an implied obligation on the seller to load with reasonable despatch, but the obligation may be excluded by an exception clause such as a force majeure clause and is in any event a weak obligation in that in calculating the reasonable time allowed to the seller, account is taken of their other reasonable engagements.⁵

The seller may also be under an implied obligation, analogous to that of the charterer under the rule in *The Aello*⁶ and *The Atlantic Sunbeam*,⁷ to do all that is necessary to facilitate the vessel's berthing. In *The World Navigator*⁸ the sale contract, which was on Centro terms,⁹ required the FOB seller to load at a minimum average loading rate of 500 tonnes of maize per day once the vessel had berthed at Rosario in Argentina, which gave 48 days in which to load. The buyer incurred demurrage due to delays in the vessel berthing after becoming an arrived ship. Had the seller's documentation been in order, the vessel would have berthed 17 days earlier.

The Court of Appeal considered that the seller might have been in breach of an implied obligation to do all that was necessary to enable the vessel to berth on the expiry of the 15 days' notice of expected readiness to load. However, assuming that the sellers were in breach of such an obligation, the buyers were unable to show any loss as a result of this breach. Absent the breach, loading would have commenced earlier, but a defendant in performing their contractual obligations was assumed to have chosen to perform them in the way least beneficial to the plaintiff, in this case at the minimum rate specified in the contract.¹⁰ On this basis the loading would have been completed before the expiry of the time allowed to the sellers. Account was not to be taken of the actual loading rate achieved by the sellers following berthing, which was in excess of the minimum rate. There was nothing in the award to show that loading in the customary manner at Rosario would have prevented the sellers using all the time which the contract allowed.

3.2 Self-contained compensation regimes for delay in sale contracts

One way for CIF sellers and FOB buyers to deal with delay in discharging and loading, respectively, is by way of inserting a self-contained compensation regime

⁵ "I think the shipowners' obligation was to load in a reasonable time, excluding delay caused by the excepted causes, and allowing them a reasonable exercise of their business in supplying other ships." (Scrutton LJ in *Einar Bugge A/S v W.H. Bowater Ltd* [1925] Vol 21 Ll L Rep 80, at 82).

⁶ [1961] AC 135. This remains so despite the overruling of *The Aello* on another point in *The Johanna Oldendorff* [1974] AC 479.

⁷ [1973] 1 Lloyd's Rep 482.

⁸ *Kurt A. Becher G.m.b.H. & Co. K.G. v. Roplak Enterprises S.A., Roplak Enterprises S.A. v Tradax Ocean Transportation S.A.* [1991] 2 Lloyd's Rep 23.

⁹ It was also on GAFTA 100 terms, cl.16 of which provided that the vessel was to load in accordance with the custom of the port unless otherwise stipulated, but the Centro terms provided a comprehensive code determining the time allowed to the seller for loading.

¹⁰ Referring, *inter alia*, to the charterparty principle in *Margaritis Navigation Agency Ltd. v Henry W. Peabody Ltd* [1965] 1 QB 300, and *Nolisement (Owners) v Bunge & Born* [1917] 1 KB 160 that a shipper of goods may use all the laytime in loading if they please, even though they could easily have loaded more rapidly, and are under no obligation to act reasonably in that respect.

into their contracts of sale, without any reference to the charterparty made for the carriage of the goods. Subject to the law on penalties, there is no objection to a CIF seller or FOB buyer recovering more under the demurrage clause in the sale contract than is paid out under the charterparty. This was the case in *Houlder Bros v Commissioners of Public Works*.¹¹ The sale contract provided for discharge immediately on arrival of the carrying vessels at their discharge ports at specified rates of tons per day (120 tons for “sailers” and 250 tons for “steamers”), failing which demurrage was to be paid at, respectively, 4d or 6d per vessel’s net registered ton per day. Lord Atkinson refused to construe the demurrage provision as an indemnity provision, subject to a cap as per the rates specified in the sale contract. He stated:

There is, however, no rule of law that the vendor in a c.i.f. contract may not secure for himself a profit under a demurrage clause contained in it. Neither is there any indisputable presumption of law that the parties to such a contract did not intend that he should receive such a profit. . . It may well be that the contract, as interpreted by both Courts of Appeal, would be more equitable as regards the respondent than if interpreted as their Lordships think it must be; but the answer to that is that the parties must be bound by their own words, that the language they have chosen to employ is too precise and unequivocal, and their course of action too suggestive and uniform to permit a modification of the respondent’s obligations in the direction desired.¹²

Where the sale contract has its own laytime and demurrage regime without any reference to a charterparty, that regime will operate differently in respect of the starting of laytime. The issue in *The Handy Mariner*¹³ was when laytime started to run under a contract CIF free out Lorient, which had its own terms on loading and discharge and its own demurrage and despatch rates and made no reference to any charterparty. The Court of Appeal held that laytime did not start to run under the sale contract until the vessel had berthed. The reference to “Lorient” as opposed to a “berth in Lorient” did not mean that this was a “berth” sales contract. Staughton LJ started by considering cl. 3 of GAFTA 100 which left a space for a destination. When doing this, parties generally named only a port or ports without any reference to a berth, and the seller’s counsel could refer to only two cases, one in 1904 and the other in 1932, when such a reference had been made. By inserting a port into the form, the parties were not intending the result under a charter that would ensue by referring to a port. Clause 16 then provided that discharge was to be as fast as the vessel could deliver in accordance with the custom of the port; it was difficult to suppose that this covered a period when the vessel could not deliver because she was at anchor in the roads, unless, which was not the case here, the custom of the port was to discharge into lighters. Although reluctant to depart from the weight of opinion of trade arbitrators, Staughton LJ concluded that the parties had not intended to alter the effect of naming a port as the destination in GAFTA form 100, without amending cl. 16. As Neill LJ observed: “The natural meaning to be placed on any stipulation as to the time of

11 [1908] AC 276.

12 See [1908] AC 276, at 291.

13 *Ets Soules & Cie v Intertradex SA* [1991] 1 Lloyd’s Rep 378.

discharge between seller and buyer is that the time should run from the moment the seller places the goods at the disposal of the buyer.”¹⁴

3.3 Compensation regimes incorporated from charterparties

3.3.1 Which charter is incorporated?

The sale contract may contain express provisions linking it with provisions of the charterparty, either through a general reference, “laytime and demurrage as per charterparty dated . . .”, or through its own loading and discharging regime but with incorporation of the charterparty provisions relating to despatch and demurrage, or the incorporation of the charterparty demurrage rate. This linkage will work if a voyage charter is involved but the charter has not been concluded at the date of the sale contract. In *Gill & Duffus SA v Rionda Futures Ltd*¹⁵ the CIF sellers had a standing arrangement as charterers with the shipowners for chartering by which demurrage rates for discharge in Tunisia would be \$2,000 per day, but in Libya \$5,000 per day. The buyers argued that as no charter had been specified, the sale contract’s provision that “Despatch and demurrage at discharge to be for buyer’s account. Demurrage as per C/P” should either mean that there was no demurrage or that it should be at the lower of the two rates agreed by the seller with the shipowners. Clarke J held that the provision incorporated the Libyan discharge rates, as the expression “as per charterparty” referred to the charterparty pursuant to which the cargo was being carried, or was to be carried, from Cuba to Libya. Provided that the charter concerned was a genuine commercial arrangement, it did not matter that the charter had not been drawn up at the time when the contract of sale was made, or that the rate of demurrage depended on a standing arrangement between the sellers and the shipowners.

However, such linkage will not work if the sale contract provides for demurrage “as per charterparty” and the charterparty is a time charter, under which hire is due, rather than a voyage charter. In *Mallozzi v Caropelli*¹⁶ CIF sellers had concluded a time charter for two round trips before making the sale contract which provided “Demurrage/half despatch on loading at the rates indicated in the charterparty for buyer’s account”. The buyers exceeded the discharging time specified in the sale contract but were not liable for anything as no demurrage was due under the time charter, nor was there any other obligation for which they would be liable.

3.3.2 Which charter terms are incorporated?

Where the sale contract incorporates the terms of the charterparty demurrage provisions, what provisions are brought thereby into the sale contract? The issue arose in *OK Petroleum AB v Vitol Energy SA. (The Chemical Venture and The Jade)*.¹⁷

¹⁴ See [1991] 1 Lloyd’s Rep 378, at 388.

¹⁵ [1994] 2 Lloyd’s Rep 67.

¹⁶ [1976] 1 Lloyd’s Rep 407.

¹⁷ [1995] 2 Lloyd’s Rep 160.

A CIF contract of sale necessitated the chartering of two vessels by the seller to perform it. The contract of sale contained its own laytime provisions and stipulated for demurrage as per charterparty. At the date of the sale contracts, no charterparty had been concluded, but subsequently two charters were concluded, both containing a 90-day time limit for bringing demurrage claims against the charterers. The buyers argued that the sellers' demurrage claim was barred, as it had not been brought within the 90 days specified in the charterparty clause.

Colman J held that the sale contract contained free-standing provisions as to laytime and demurrage,¹⁸ and that the incorporation of the demurrage provisions of the charter could be read as incorporating the charter provisions which went to the calculation of the sum to be paid as liquidated damages. The charter provisions would determine whether discharge had exceeded the laytime specified in the sale contract as well as the amount of demurrage. Accordingly, NOR provisions in the charter and laytime and demurrage exceptions would be brought into the sale contract to the extent they were not inconsistent with the express laytime provisions of the sale contract. Colman J stated:

One can therefore confidently conclude that, at the very least, the sale contracts incorporated the provisions in the charter-parties specifying the rate of demurrage and those clauses going to the calculation of laytime, such as the notice of readiness clause from Part II of the standard Asbatankvoy form (save insofar as it was inconsistent with the provision in the sale contract that the buyers would be entitled to six hours free time after notice of readiness), cl. 1 calculation of laytime – from the OK Petroleum A.B.'s charter-party terms and conditions, including those of the excepted perils at (a)(i) to (v) and (b) insofar as they had not been deleted, as some of them had been under the Chemical Venture charter, the hours for loading and discharging clause from Part II, as well as the demurrage clause and the safe berthing-shifting clause, to the extent not incompatible with cl. 11. I would further hold that all the provisions in those clauses which cut down what would otherwise be the charterer's liability for demurrage would be incorporated into the sale contracts for the benefit of the buyers. For example, under cl. 11 of the OK Petroleum A.B.'s terms and conditions the circumstances in which time is not to count could be relied upon as fully by the buyers under the sale contract as by the charterers under the charter-party.¹⁹

18 The sellers had initially submitted that this was an indemnity case in which case to incorporate the charterparty time-bar provisions would be an irrational deprivation of their rights of indemnity. In the course of argument, the sellers' counsel conceded that this was not an indemnity case. Colman J observed at p. 164: "That conclusion must follow from the express provisions in the sale contracts for laytime at the discharge port. Although in both cases half the laytime under the charter-party is allowed to the buyers, the charter-parties provide for aggregation of laytime at both loading and discharging ports. In the result it would be possible for the charterers to have exhausted their charter-party entitlement to laytime at the loading port, whereas the buyers were still entitled under the sale contract to the whole of the laytime at the discharging port." Had this been an indemnity case, "[t]here would be much to be said for the argument that the time bar could not have been intended to operate for the benefit of the buyer since the seller might only receive notification of a claim for demurrage which was so late within the 90 days that he was unable to preserve his right of indemnity by giving notice to the buyer within the 90 day period."

19 See 4. In *The Devon* [2004] EWCA Civ 822, [2004] 2 Lloyd's Rep 282, where the sale contract incorporated the demurrage rate of the charter, this brought in those provisions of the charter which provided for demurrage to be at half rate in the event of "fire, explosion, storm or by a strike, lockout, stoppage or restraint of labour or by breakdown of machinery or equipment in or about the plant of the charterer, supplier, shipper or consignee of the cargo" under cl. 8 of the Asbatankvoy form.

However, ancillary terms, such as the demurrage time bar,²⁰ were not to be incorporated where the incorporated contract did not exist when the incorporating contract was entered into and could not be presumed by the parties to the latter to contain any specific wording or terms. Colman J reached this conclusion by reference to the cases on incorporation of charterparty terms into bills of lading, while acknowledging the differences between contracts of sale and contracts of carriage.²¹

3.3.3 *Free-standing obligation or indemnity?*

A link to a charterparty from the sale contract might operate either by way of indemnity or by way of an independent laytime and demurrage code. The sale contract may make it clear that demurrage is recoverable only if claimed by the shipowners, which will be a clear instance of an indemnity. This was the case in *The Yellow Star*²² where the demurrage clause in the sale contract provided: “(1) Any demurrage is due provided owners actually claim it. (2) Pro Rata quantity loaded if part cargo. (3) Rat[e] as per c/p. Rat[e] AFRA to apply if vessel owned or t/c. (4) Any claim barred if not notified duly supported by relevant documents (whereof copy of c/p and copy of owner’s demurrage claim and invoice) within 90 days from b/l date.” As the clause was an indemnity, a claim for demurrage by the shipowner constituted a relevant document to be submitted within 90 days of the date of the bill of lading. In a string contract, the intermediate party may contract so that its liability to the party up the string is dependent on the recovery it makes from the party down the string. In *The Ama Ulgen*,²³ the sale contract provided “Demurrage as per charterparty but recoverable to the extent that same can be recovered from Baniyas terminal”. The Court of Appeal held that the words “can be recovered” meant “can with the exercise of due diligence be recovered”.

However, the position is not so clear when the sale contract simply refers to the demurrage provisions of the charterparty. Generally, the courts will find that the sale contract has created a free-standing demurrage obligation, but in one case the courts have found an indemnity. In *Suzuki & Co. v Companhia Mercantile*

20 Even if incorporated, it would not have been operative in the sale contract due to linguistic inconsistency, as the charter explicitly referred to the liability of “charterers” for demurrage. “Charterers shall not be liable for demurrage incurred and/or other costs and/or charges incurred under the charterparty and pertaining to charterers use of the vessel unless charterers within 90 days . . . [from disconnection of hoses] have received notification of the claim . . . claims.”

21 See [1995] 2 Lloyd’s Rep 160, at 165–166. The differences are threefold. First, the shipowner is the same party under both the bill of lading and the charter and their interest is to match the terms of both contracts. In contrast, the seller is the recipient of the benefit of the charter and the provider of that benefit under the sale contract. Second, the bill of lading is a negotiable instrument, whereas there can be no assumption that the CIF buyer will transfer or assign its rights to a third party. Third, the bill of lading cases have proceeded on the basis that the original bill of lading holders must be taken to have had access to the terms of the charter at the time they entered into the bill of lading contract.

22 [2000] 2 Lloyd’s Rep 637 (Central London Cty Ct).

23 [2001] 1 Lloyd’s Rep 512.

*Internacional*²⁴ the Court of Appeal held that the obligation to pay demurrage was merely an obligation to indemnify in circumstances where the sale contract contained provisions that the steamer was to be discharged within a certain time at a certain rate, but the only reference to the charterparty was a provision that demurrage was to be as per charterparty, with no rate of demurrage being specified. The discharge rate provisions in the CIF contract were identical with those in the charterparty concluded by the seller, under which the seller would have been under no liability to the shipowner due to the presence of a cesser clause. Notwithstanding the clause, the seller had paid the shipowner the demurrage due at the discharge port. As the sale contract demurrage provision operated by way of indemnity, the seller, not being under any personal liability to the shipowner in respect of demurrage, was unable to recover the demurrage it had paid from the buyer.

In all subsequent cases, the courts have construed the link to the charterparty demurrage provisions as creating a free-standing obligation. In *The Adolf Leonhardt*²⁵ an FOB contract provided: "Special conditions . . . Time to count as per Centrocon charter party, WIBON, WIPON, WIFPON. Demurrage/Despatch as per C/P . . . Other Conditions as per Centro Exportadores term . . .".²⁶ Staughton J expressed the view, explicitly *obiter*,²⁷ that the sale contract was to be construed as a free-standing code, stating:

What persuades me that an independent obligation was intended here is the reference in the sale contract to the Centrocon charter-party, scilicet in its printed form. Whatever terms might be agreed between the buyers and a shipowner, or their sub-buyers, it was all Lombard Street to a china orange that they would not be precisely the printed terms of the Centrocon form. The buyers had not, when they contracted with the sellers, concluded their sub-sale, at any rate in point of form; it makes good sense that they should bargain for an independent obligation in the terms of the printed form, if only as an approximation to what they might agree with their sub-buyers.²⁸

In *Gill and Duffus SA v Rionda Futures Ltd*²⁹ the sale contract provided detailed provisions relating to laytime and stipulated " . . . Despatch and demurrage at discharge to be for buyer's account. Demurrage as per C/P" and provided that demurrage was to be "settled as incurred by buyers every 15 days". Clarke J stated that this was not a case like *Suzuki*: "Here the expression 'demurrage as per C/P half despatch' does not stand alone but appears in the contract after detailed provisions as to when notice of readiness could be given and as to the calculation of laytime. In its context that expression means in my judgment no more than that

²⁴ (1921) 9 Ll L Rep 171.

²⁵ [1986] 2 Lloyd's Rep 395.

²⁶ The Centro terms provided, *inter alia*: "Loading Rate: Once vessel is berthed alongside berth suitable to Sellers and ready to load this parcel, Sellers guarantee . . . according Centrocon, but Sellers shall not be responsible for anytime lost due to . . . strikes . . . or any other cause of force majeure".

²⁷ See [1986] 2 Lloyd's Rep 395, at 400. The decision was based on the first of the seller's arguments that under the terms of the Centrocon charterparty which was incorporated into the sale contract, the liability for delay due to congestion was not placed on the sellers.

²⁸ [1986] 2 Lloyd's Rep 395, at 404.

²⁹ [1994] 2 Lloyd's Rep 67.

the rate of demurrage in the relevant charter-party should be the rate of demurrage for the purposes of the contract of sale.”³⁰ In *OK Petroleum AB v Vitol Energy SA*³¹ Colman J stated that the conclusion that the sale contract contained an independent demurrage obligation must follow from the express provisions in it for laytime, which differed from those in the charters subsequently negotiated by the sellers.³²

The principles for determining how a reference to laytime and demurrage provisions in a charterparty operated in a contract of sale were considered in detail by the Court of Appeal in *The Devon*.³³ The contract of sale, on C & F terms, provided for a total of 36 hours laytime, “to commence six hours after Notice of Readiness is tendered or upon berthing whichever is earlier and time shall cease counting at disconnection of hoses” and provided for demurrage as per charterparty per day *pro rata*. One of the issues was whether the sellers could claim demurrage from the buyers under these provisions even when the seller as shipper had incurred no demurrage under its charterparty. Mance LJ, giving the majority judgment, held that the precise nature and effect of any demurrage provision in a sale contract depended on the context and wording of the particular provisions, including the scope of any reference to or incorporation of the demurrage provisions of any charterparty or other third party contract. In the absence of any such reference, the natural inference was that the sale contract constituted an independent code and was not an indemnity provision. This meant that demurrage due under those provisions could be recovered even though the seller had not incurred any liability for demurrage under the charter.³⁴

Mance LJ emphasised the advantage in terms of commercial certainty for parties to know precisely where they stand and an independent laytime and demurrage scheme would be simpler and more acceptable to agree and operate, stating: “in the event that delay occurs, they will know precisely where they stand, rather than to contract on a basis which makes their rights *inter se* depend upon the rights and liabilities of one of them, and possible disputes under some actual or future contract with a third party”.³⁵ An independent demurrage provision in a sale contract adopting the demurrage rate in the charterparty could, subject to

30 [1994] 2 Lloyd’s Rep 67, at 77. He further observed that the reference to “buyer’s account” did not indicate that the demurrage provisions operated by way of indemnity: “It is clear from these authorities that where a sale contract incorporates the terms of a charter-party relating to demurrage in an otherwise independent sale contract containing, for example, provisions about laytime, that the obligation in the sale contract is generally to be construed as an independent demurrage obligation and not as an indemnity.”

31 [1995] 2 Lloyd’s Rep 160.

32 [1995] 2 Lloyd’s Rep 160, at 164 (“Although in both cases half the laytime under the charter-party is allowed to the buyers, the charter-parties provide for aggregation of laytime at both loading and discharging ports. In the result it would be possible for the charterers to have exhausted their charter-party entitlement to laytime at the loading port, whereas the buyers were still entitled under the sale contract to the whole of the laytime at the discharging port”).

33 *Fal Oil Co Ltd v Petronas Trading Corp Sdn* [2004] EWCA Civ 822, [2004] 2 Lloyd’s Rep 282.

34 In *The Adolf Leonhardt* [1986] 2 Lloyd’s Rep 395, the demurrage provisions in the sale contract were held to be an independent code and were not related to laytime and demurrage clauses in other contracts up or down a string of sales.

35 [2004] EWCA Civ 822, [2004] 2 Lloyd’s Rep 282, at [33].

the law on penalties, be justified as a genuine pre-estimate of the receiving party's exposure.³⁶

Mance LJ concluded that the present sale contract provisions constituted an independent code, for four reasons. First, it was made independently of, and without knowledge of, the terms of any charterparty. The sale contract covered four shipments, so there might well have been four very different charterparties and the sale contract's own laytime code in clause 10 would not necessarily correspond with whatever future charter might be concluded. With the first shipment which was the subject of the dispute there was a discrepancy between the laytime provisions in the charter and those in the sale contract. Second, once the charterparty and sale laytime provisions may not coincide, there are problems in treating the sale contract demurrage provisions as operating by way of indemnity.³⁷ This could only be done by reading the sale contract demurrage provisions as a minimum discharging period which must elapse before demurrage became due, subject to it being at the same time payable under the charterparty. Third, and most importantly, the present sale contract demurrage clause (cl. 11) clearly incorporated a rate, and no more, and was therefore distinguishable from *Suzuki* where demurrage was provided to be "as per charter-party or freight agreement". Fourth, once the express words of the laytime and demurrage provisions are interpreted as only referring to the charterparty rate, their natural reading and effect is as an independent obligation.

The Devon was applied in *The Team Annaj*³⁸ where the issue before Beatson J was when time started to run for limitation purposes in respect of a demurrage claim under two cif sale contracts. The sale contracts had their own laytime provisions and provided that demurrage would be "as per charterparty rate, terms and conditions". The charter contained a time bar provision which as an ancillary provision was not incorporated into the sale contract.³⁹

Demurrage was claimed up to 10 January 2005, with discharge completing the following day, and proceedings were issued on 11 April 2011. If the laytime and demurrage provisions in the sale contracts were free-standing independent obligations by the buyer to pay demurrage, demurrage would accrue day by day *pro rata* from the moment when the laydays expired and time would have expired.⁴⁰

36 [2004] EWCA Civ 822; [2004] 2 Lloyd's Rep 282, at [35]. This remains true today, it would seem, under the new test for penalties advanced in the Supreme Court decision in *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2015] 3 WLR 1373.

37 In *Houlder Brothers v Commissioners of Public Works* [1908] AC 276, the Privy Council drew attention to the problems of an indemnity construction when the sale contract provisions as to discharge differed from the demurrage regime in the charterparty. The sale contract provided for discharge immediately on arrival of the carrying vessels at their discharge ports at specified rates of tons per day (120 tons for "sailers" and 250 tons for steamers), failing which demurrage was to be paid at, respectively, 4d or 6d per vessel's net registered ton per day. Lord Atkinson observed at pages 289–290 that: "It is, moreover, difficult to see how the principle laid down would work in practice", in which connection he took as an example the situation of a charter of a sailing vessel providing for discharge at only 100 tons per day or for demurrage at only 3d per registered ton per day.

38 *Glencore Energy (UK) Ltd v Sonol Israel Ltd* [2011] EWHC 2756 (Comm), [2011] 2 Lloyd's Rep 697.

39 See *OK Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd's Rep 160, note 17 above.

40 See *President of India v LIPS Maritime Corp* [1998] 1 AC 395, at 422 (Lord Brandon).

However, the buyer argued that the laytime and demurrage provisions constituted obligations to indemnify the seller, in which case the obligation accrued only when the seller presented the buyer with the relevant documents including an invoice. This was on 28 April 2005, so the proceedings had been commenced just within the six-year limitation period.

Referring to *The Devon*, Beatson J identified two factors of particular significance in ascertaining whether the demurrage provisions in the sale contract were free-standing or whether they constituted an indemnity. The first factor was whether the sale contract's demurrage clause incorporated only the demurrage rate in the charterparty. This would be an indication of the sale clause being a free-standing independent demurrage obligation. This factor was not present in the present case where the clause provided "as per charter-party rate, terms and conditions". However, the second factor was whether the sale contract contained its own laytime provisions, and, if so, whether they coincided with those in the charterparty. This was not the case here, as the laytime provision in the charterparty was "84 hours SHINC", which differed from the "48 hours, Sundays and holidays included" in the sale contract.

The buyers argued that construing the laytime and demurrage provisions as independent obligations would entail the cause of action accruing before the date at which the second sale contract was concluded, with the result that the claimant would be subjected to an obligation that it was impossible to perform at the date of contract. However, where performance was largely completed before the contract was concluded, there was no reason in principle why a cause of action could not accrue at that time as well.⁴¹ The claimant's case, that no cause of action accrued until it presented its claim for demurrage, would permit it to present a claim long after discharge was complete and thus prevent the cause of action accruing until that time.

3.3.4 *Interpreting incorporated laytime and demurrage provisions in a sale contract*

Where there is a reference to the laytime and demurrage provisions of the charterparty, this issue will be governed by relation to the law governing commencement and running of laytime under charterparties. Generally, where the sale contract incorporates the laytime and demurrage provisions of a charterparty, these will be interpreted in the same way as is the case in a charterparty. In *Gill & Duffus v Rionda*⁴² one of the issues was whether the master's NOR was invalid as regards the commencement of time under the sale contract in that at the time it was given the vessel was not willing to discharge the cargo, due to its compliance with the buyer's instructions, due to the failure of its sub-buyer to open a letter of credit. Clarke J held that the master's NOR was valid under the charterparty, as the vessel

⁴¹ Compare the position where parties act on an informal understanding which is not binding and a formal contract made later is held to have retrospective effect: *Trollope & Colls Ltd v Atomic Power Construction Ltd* [1963] 1 WLR 333.

⁴² [1994] 2 Lloyd's Rep 67.

was ready to discharge and the same applied as regards the sale contract which made express reference to the giving of NOR by the master.⁴³

Similarly, in *The Bonde*⁴⁴ Potter J applied the charterparty rule that demurrage provisions were the exclusive remedy for delay in loading to a dispute between seller and buyer under an FOB contract.⁴⁵ The seller was bound to load at a particular rate and to pay demurrage if that was not achieved, and the seller was entitled to recover carrying charges from the buyer unless the ship was presented with the shipment period, which was not the case. The buyer sought to resist this claim on the grounds that, were it to succeed, any recovery could be recovered from the seller for breach of its obligation to reach the loading rate. The argument was rejected, as any such breach could only be compensated at the demurrage rate, and the seller's obligation to deliver the cargo was not to be regarded as a distinct obligation from its obligation to load the cargo.

However, the buyer's obligation to provide a letter of credit will affect the starting of laytime under a sale contract which incorporates the provisions of a charterparty. In *Kronos Worldwide Ltd v Sempra Oil Trading*⁴⁶ the Court of Appeal looked at the application of the provisions of the sale contract first in determining how the incorporated laytime and demurrage provisions operated. It was a condition precedent to the seller's obligation to load that the buyer had opened a letter of credit. Laytime could not commence until this had occurred, and there was no possibility of it retrospectively running following provision of the letter of credit. It was not possible to gain, from the well-recognised principle explained in *The Aello*, any support for the proposition that Kronos as seller had any obligation to berth the vessel, or to have cargo available in order to enable her to berth, separate from its general loading obligation.⁴⁷ Mance LJ stated:

I have no doubt that the provision of a letter of credit should be regarded as a condition precedent to any obligation on the part of the seller to perform any aspect of the loading operation which is the sellers' responsibility. So, if the contract had been one under which notice of readiness could only be given in berth and the vessel had berthed, the seller could not have been obliged, for example, to connect the hoses, before refusing to pump gasoil through them. Here notice of readiness could be given and laytime could begin to run after arrival in port, but it would make no commercial sense to treat the seller as obliged to berth the vessel, in circumstances where there could be no duty to load cargo once the vessel was in berth. Berthing a vessel costs money,

43 *The Handy Mariner* was distinguished, as the sale contract there made no reference to a charterparty and no provision for the tendering of notice of readiness.

44 [1991] 1 Lloyd's Rep 136 (QB).

45 See *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 KB 352. The case involved a claim for deadfreight due to restrictions imposed by the port authority as to the quantity that could be loaded onto the vessel. There were two breaches – (i) failure to load a complete cargo by expiry of laytime and (ii) subsequent detaining of the vessel in port – and deadfreight could be recovered in respect of the first.

46 [2004] EWCA Civ 3, [2004] 1 Lloyd's Rep 260.

47 *The Aello* would only be relevant if the vessel could only have become an arrived ship and have given notice of readiness on reaching the berth, in which case it was arguable that the seller would be in breach of duty in not having cargo to enable the vessel, after reaching the port, to proceed to berth. However, such a breach would not have started laytime running but at most would have entitled the buyer to damages and would have been irrelevant to the preliminary issue before the court. Additionally, there would have been a question whether the provision by the buyer of the letter of credit was itself a condition precedent to the seller's duty under *The Aello*.

because of towage and/or berthing fees. If a vessel is berthed but not loaded because of the absence of a letter of credit, problems on the seller's part and disputes with the berth-owner (if different from the seller) will also be likely.⁴⁸

A clear rule was needed to govern such situations:

laytime is the time allowed for the loading operation, while the provision of a letter of credit is a condition precedent to the seller's duty to perform any part of the loading operation. The two, in other words, bear on the same subject-matter. To try to distinguish the physical parting with possession of the cargo from other aspects of the loading operation such as berthing, as *Sempra* does, is artificial and wrong in principle. Until the appropriate letter of credit is to hand, a seller is not obliged to perform any part of the loading operation.⁴⁹

Once such a credit was provided, *Kronos* had the laytime within which to perform its obligation.

The issue of the running of laytime and the effect of exceptions has been considered in a couple of cases. In *The Hang Ta*⁵⁰ the issue was the construction of a WIBON⁵¹ provision in a CIF contract for the sale of coal. On arrival at the discharge port, Amsterdam, the berth was occupied by another vessel, but also tidal conditions were such that the vessel would have been unable to reach the berth anyway. Clause 7.13 of the sale contract provided:

Upon arrival at the Discharge Berth the Master of the Carrying Vessel shall give a Notice of Readiness to discharge at any time during the day or night SSHINC whether in Free Pratique or not, and whether customs cleared or not, by telex, radio or e-mail. In case the berth is occupied on arrival, vessel can tender NOR at the usual waiting place whether in berth or not, whether in port or not, whether in free pratique or not, whether customs cleared or not.

The buyers argued that the seller's primary obligation was to carry the cargo to the berth, as cl. 7.1 stated that shipment of the coal was to be the responsibility of the seller. The causation requirement of the WIBON provision should be construed in the light of this obligation and should only be effective if congestion was the sole cause of the vessel's inability to berth.⁵² If there was a weather problem the vessel could wait until it cleared, and only then if the berth were still unavailable could NOR be given. If cl. 7.13 operated with concurrent causes and the berth became available shortly after NOR was given, but with weather still preventing access, the buyer would be prejudiced by loss of some or all of the 12 hours elapsed time allowed under the laytime provisions of the sale contract.

48 [2004] EWCA Civ 3, [2004] 1 Lloyd's Rep 260, at [19].

49 See at [20].

50 *Suek International AG v Glencore AG* [2011] EWHC 1361 (Comm); [2011] 2 Lloyd's Rep 278 (QB).

51 Whether in berth or not.

52 Referring to Lord Brandon's conclusion in *The Kyzikos* that (at page 5 col 2, and at page 6 col 2), WIBON was "directed at the problem of congestion in the loading or discharging port, rather than the problem of delay to the ship due to bad weather"; and to the view of Farwell LJ in *Northfield Steamship Co v Compagnie L'Union des Gaz* [1912] 1 KB 434, at 440 that the words "whether in berth or not" were inserted to meet the very case that there was no berth vacant.

The seller submitted that the seller was not obliged to deliver to the berth and it was the buyer under cl. 7.14 who was required to procure the discharging of the vessel. There was no foundation for assuming the seller bore the heavier responsibility for ensuring arrival at berth. Burton J accepted the seller's case and held that cl. 7.13 was not to be interpreted as interfering with an overriding or otherwise primary obligation of the seller. It was the buyer's obligation to provide a discharging berth. Accordingly, the WIBON provision operated when congestion prevented the vessel from proceeding to the discharging berth, even though the weather also would have prevented her so proceeding.

In *The Athens*⁵³ the Singapore High Court recently considered the effect on the running of laytime under a C & F sale contract of the vessel being ordered off the berth for two days by the Port Authority at the discharge port in Madagascar so as to accommodate another vessel. Judith Prakash J acknowledged that the authorities on this issue were all charterparty cases, and in a sale contract, account should be taken of which of the parties bore the risk of delays in discharging the goods. In a C & F contract, that risk fell on the buyer. The sellers owed no duty to ensure actual physical delivery of the cargo, and it would therefore be remarkable that they should bear the risk of delay in unloading the goods especially when the contract of sale contained a demurrage clause. Although the decision is based on an analysis of risk under the sale contract, the same result would have been achieved by applying the principles of the charterparty cases – that once laytime starts it will continue to run unless interrupted by a laytime exception or by delay caused by fault of the shipowner. A similar analysis would apply as regards an FOB contract where the risk of delay in loading would fall on the seller.

3.3.5 Cancellation clauses and sale contracts

Another charterparty clause which may be incorporated into a sale contract is a laycan clause. This will set out the earliest date on which laytime can commence, and will also provide a date at which the charterer will be entitled to cancel the charter if the vessel is not ready to load. In the context of a sale contract, such a clause will give the seller a right to cancel if the vessel is not ready to load by the stated date. The seller will be in the position of the charterer, and the buyer in that of the shipowner. The clause is more appropriate for an FOB contract where the buyer is the party responsible for concluding the contract of carriage.⁵⁴

⁵³ *Profindo Pte Ltd v Abani Trading Pte Ltd* [2013] SGHC 10 (Comm); [2013] 1 Lloyd's Rep 370 (H Ct Sing).

⁵⁴ The clause does not sit happily when incorporated into a CIF contract where the seller is the party responsible for making the contract of carriage. This was the position in *The Azur Gas* [2005] EWHC 2528 (Comm); [2006] 1 Lloyd's Rep 163, involving a CIF contract which contained no delivery period. Christopher Clarke J held that the laycan provision did not create an agreed shipment period within which the cargo had to be loaded, stating (at [20]): "The word 'laycan', which was intentionally chosen, does not mean 'shipment'. It is perfectly capable of applying in its ordinary sense to the present contract and for it to do so is consistent with the incorporation of the charterparty. Whilst I recognise that the terms of the charter are only to be incorporated insofar as not in conflict with the main terms of the contract, the incorporation of the charter (which in clause 5 explains the meaning of laycan) is a pointer to the fact that expressions in the contract and charter were intended to have the same

However, a reference to a laycan period in the shipment provisions of an FOB contract will have a significant effect on the rights of the buyer to terminate the contract in the event of the seller's failure to load within the shipment period. In *The Luxmar*⁵⁵ cl. 7 of the sale contract provided for delivery between 27–30 May, and further provided that by 21 May at latest the laycan would be narrowed to a two-day period, and that laycan was an essential feature of the contract in favour of the seller. The buyer narrowed the laycan to 29–30 May, and on 28 May the nominated vessel arrived and gave NOR. Owing to problems at the seller's plant, the cargo was not ready and the necessary repairs were not completed until 3 June, on which day the buyers terminated the contract. The seller claimed damages for wrongful termination, and the buyer counterclaimed damages for the seller's repudiatory breach as well as for demurrage.

The buyers argued that they were entitled to terminate the contract because of the seller's failure to load the cargo within the shipment period, an obligation which was a condition. However, the effect of including a laycan provision in cl. 7 relating to delivery meant that there was no shipment period specified in the contract and the seller's obligation was to complete loading within the laytime allowed under the contract, provided the vessel presented within the period specified in the laycan provision. This obligation was an innominate term, so that the buyer would only be able to terminate in the event that there had been a frustrating delay, which was not the case here.

Longmore LJ explained the effect of the inclusion of the laycan provision in the delivery clause:

The laycan provision thus gives the FOB seller a right to bring the contract to an end in circumstances in which, without a cancelling provision, he may well have no right to do so. The concomitant of that right is that the buyer is entitled to present the vessel at any time up to 2400 on the last day of the laycan spread, here 30 May. If he is entitled to present the vessel at 2300 (or even 2359) on 30 May, the contract cannot be interpreted to mean that the seller must have completed loading by 2400 on that day because that would be a commercial absurdity. In that event, the seller must be entitled (and must also be bound) to load within the laytime provided for by the contract. If he does not do so, he will be in breach of contract. He will not, however, be immediately in repudiatory breach partly because terms as to time of loading a vessel are not traditionally (and for good reason) regarded as conditions of the contract and partly because there would be great practical difficulties if the buyer were able to terminate the contract when the vessel had been partly but not fully loaded.⁵⁶

The Court of Appeal rejected the argument that the traditional view that time of delivery is of the essence of an FOB contract could be retained with the laycan provision, by holding that the time of delivery would be a condition only if notice of readiness is in fact given at such time as would enable the ship to be loaded by the end of the delivery period, which was the position on the facts here. It was

meaning." The sale contract did not specify a delivery period, and therefore shipment had to be effected within a reasonable time under the term implied by s. 29 of the Sale of Goods Act 1979.

⁵⁵ *ERG Raffinerie Mediterranee SpA v Chevron USA Inc (v/a Chevron Texaco Global Trading)* [2007] EWCA Civ 494; [2007] 2 Lloyd's Rep 542.

⁵⁶ [2007] EWCA Civ 494; [2007] 2 Lloyd's Rep 542, at [18].

not sensible that an obligation relating to time of delivery should be a condition in one factual circumstance but not in another. The seller's delay in loading was not such as to frustrate the commercial purpose of the contract,⁵⁷ and the buyer was therefore not entitled to terminate the contract. Demurrage was the sole remedy for the seller's breach in delaying the loading of the vessel.

3.3.6 "Readiness" and presentation within the delivery period

The concept of "readiness" will enter a sale contract whenever reference is made to the laytime and demurrage provisions of a charter, through reference to the notice of readiness that must be given to start laytime running. However, the word may also appear in other contexts in the sale contract, and the question arises as to whether "readiness" here will bear the same meaning that is the case with a notice of readiness. In *Soufflet Negoce SA v Bunge SA*⁵⁸ an FOB contract provided a delivery period of 9–22 October at buyer's call both dates, with no extension. The contract was on GAFTA 49 terms, cl. 6 of which stated: "... provided vessel is presented at loading port *in readiness to load* (emphasis added) within delivery period, sellers shall complete loading after delivery period and carrying charges shall not apply".⁵⁹ The shipowners served NOR at 0520 on 22 October, but following a survey later that day, the sellers refused to load the cargo as the holds were dirty. The buyers sued the sellers for non-delivery. Initially the arbitrators found for the sellers, a finding reversed by the Board of Appeal who concluded that it was the buyers' responsibility to provide a vessel for shipment within the time agreed at the place agreed for shipment and that responsibility was discharged so long as it was physically and legally possible for the sellers to load, on the nominated ship, the agreed goods at the agreed place within the agreed time.⁶⁰ The Board referred to what they called "the fundamental commercial dynamic of the sale", namely that risk of loss or damage passed from the sellers to the buyers on the loading of the goods onto the vessel chartered by the buyers. If the goods were damaged by shipment into unclean holds, the shipment was the buyers' decision and at their risk.

The Board's decision was upheld by the High Court and then by the Court of Appeal. Longmore LJ was of the view that "much clearer words would be necessary if all this shipping law is to be transported into an FOB sale contract. The phrase 'in readiness to load' does not expressly say that a notice of readiness must have been (or at least be capable of being) given. If that was the intention the form would have said so and not left it to implication."⁶¹ This interpretation was

⁵⁷ *Universal Cargo Carriers Corp'n v Citati* [1957] 2 QB 401.

⁵⁸ [2010] EWCA Civ 1102; [2011] 1 Lloyd's Rep 531.

⁵⁹ The clause varied the default position in FOB contracts whereby the seller's obligation to load ceases at the end of the delivery period.

⁶⁰ This was probably a reference to the standard position under an FOB contract at common law in the absence of any relevant express terms, that the buyer is bound to give instructions with regard to the shipment of goods and those instructions must be "effective" instructions in the sense that it must be possible and lawful for the seller to comply with them. See *Agricultores Federados Argentinos v Ampro SA* [1965] 2 Lloyd's Rep 157.

⁶¹ [2010] EWCA Civ 1102; [2011] 1 Lloyd's Rep 531, at [13].

bolstered by the express reference to NOR in the laytime provisions of the sale contract. Longmore LJ stated:

By making clear that a valid NOR is required to operate the laytime and demurrage provisions of the contract, the parties are by implication saying that a valid NOR is not required for other purposes (eg for determining whether the vessel has arrived during the period of delivery). All that has to happen within the delivery period is that the vessel must be presented in readiness to load at some time between 0001 on 9 October and 2400 on 22 October. The fact that the holds may have needed some cleaning on arrival does not mean that the sellers can throw up the sale contract on the basis that no vessel has arrived during the period fixed for delivery.⁶²

3.4 Conclusion

One might think that an indemnity provision would be the preferred route for passing on liability for demurrage to one's counterparty under the contract of sale. However, there is an advantage of commercial certainty for the parties to know exactly where they stand. This is what they will get by the operation of an independent freestanding laytime and demurrage regime, which does not make their rights depend upon the liability of either the CIF seller or FOB buyer under their contract with a third party, which is very likely not in existence at the date of the contract of sale. Although the question of whether an indemnity or an independent scheme is created is to be looked at from a neutral starting point, it is the case that nearly all the cases have concluded that the contract has set out an independent scheme.

Where the sale contract has its own self-contained code with a specified loading or discharging rate and a demurrage rate, it is natural to take that as creating a freestanding obligation on the counterparty who will load or discharge as the case may be. This was conceded in *The Handy Mariner*. Where the sale contract refers to the laytime and demurrage provisions of a charterparty, the analysis adopted by Mance LJ in *The Devon* leads to the conclusion that an indemnity will arise only where: (a) the sale contract contains its own laytime provisions which are identical to those in the charterparty and refers to "demurrage as per charterparty", as was the case in *Suzuki* or (b) the sale contract incorporates both the laytime and the demurrage provisions of the charterparty.

Where a free-standing code operates in the sale contract, the introduction of charterparty concepts into that contract will bring in the body of charterparty law relating to laytime and demurrage. This may sit awkwardly in a sale contract, but, subject to two exceptions, that is what the parties will get when they link their contract to a voyage charter. First, the buyer's obligation of providing a letter of credit will serve as an additional precondition to the commencement of laytime at the loading port. Second, where the sales contract contains its own self-contained regime and makes no reference to a charterparty, laytime will not start to run until the vessel berths. Otherwise, there seems to be no special sales law relating to laytime and demurrage, notwithstanding the observations of Judith Prakash J in *The Athens* referred to above.

⁶² See at [14].

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PART 2

CARRIAGE AND SALES

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CHAPTER 4

‘Who’s doing what and for whom?’: recent developments on delegated contractual performance

*Simon Rainey QC**

4.1 Introduction: delegated performance

It is a common phenomenon for a contractual party to delegate the performance of a non-delegable contractual obligation to a third party. In the context of contractual chains, it will invariably be the case that the intermediate parties delegate performance of their obligations to the parties at either end of the chain. Such delegation gives rise to the issue of the circumstances in which the contractual party will be liable for the acts or omissions of the third party delegate.

There are two related issues. First, in what circumstances will a contracting party be liable to its contractual counterparty in the performance of its contractual obligations in respect of the acts or omissions of a third party? In other words, for what types of act of the delegate will the contractual party be responsible? Second, for whose acts will a contracting party be treated as being responsible in law outside its own personal acts? In other words, for the acts or omissions of which third parties will the contractual party be responsible?

The debate on these two issues is potentially a very wide-ranging one. As will be seen from the cases considered in this chapter, problems of responsibility for delegated contractual performance can arise in an array of contexts. Frustration, force majeure clauses, laytime and demurrage clauses and off-hire clauses, to name but a few, can all give rise to such problems.

A common attempt at a ‘solution’ to such problems is to use specific contractual wording with a view to defining the scope of such responsibility. The wording may take the form of a humble reference to ‘the reasonable control of charterers or owners or their respective servants or agents’, or, at the other end of the spectrum, the wording may be complex and apparently very precise. As will be seen, the result of the recent authorities is that the efficacy of such wording can rarely, if ever, be guaranteed.

This chapter considers the two issues identified above by taking a short *tour d’horizon* of the relevant authorities, with particular emphasis on the recent cases of *Great Elephant Corporation v Trafigura Beheer BV (The Crudesky)*¹ and *NYK*

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1 [2013] EWCA Civ 905; [2014] 1 Lloyd’s Rep 1.

Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh).² In the latter case, the Supreme Court reviewed what many saw as a very wide expansion of previously settled principles by the Court of Appeal in favour of a broad approach to commercial risk allocation under a time charterparty, based on what should be regarded as falling on the owner's or charterer's side of the line. The Supreme Court, in a landmark decision regarding responsibility for delegated contractual performance, reinstated the principle of vicarious performance of a delegated obligation defining the scope of responsibility.

4.2 The starting point: the 'delegate' principle

The starting point is the 'delegate' principle. A contracting party will be liable to its counterparty for the acts or omissions of third parties to whom the performance of any non-delegable contractual duty has been delegated. Although straightforward in theory, this principle frequently gives rise to problems in practice. The typical issue which arises is whether the relevant act or omission of the third party forms part of a non-delegable contractual obligation undertaken under the applicable contract. To put it another way, the issue is whether the relevant conduct of the third party falls within the scope of a non-delegable contractual obligation which has been delegated to that third party by the contracting party.

Four cases are worthy of mention. The first two illustrate that sub-charterers, receivers and other third parties are not, in general, agents of the charterers of the vessel. They are agents only to the extent that they perform an obligation of the charterers under the charterparty. The second two cases illustrate that the distinction between acts or omissions which fall within the scope of the charterers' contractual obligation and those which do not can be a difficult one to draw.

4.2.1 The *Mediolanum* and The *Goodpal*

The case of *Mediolanum Shipping Co v Japan Lines Ltd (The Mediolanum)*³ concerned a time charterparty of the vessel *Mediolanum* on an amended NYPE form. The vessel grounded in the port of Las Minas in Panama, to which the charterers had ordered her for the purpose of taking on bunkers from a refinery. As a result of the grounding, there was a delay of 1.798 days before the vessel was refloated. She also sustained damage to her bottom, which necessitated repairs in Hamburg.

The owners contended that the charterers were liable for the cost of the deviation to Hamburg and of the repairs, as well as for the additional bunkers consumed during the deviation. The charterers denied liability for the grounding and contended that the vessel was off-hire while aground and during the deviation.

² [2016] UKSC 20, on appeal from Court of Appeal ([2014] EWCA Civ 403; [2014] 2 Lloyd's Rep 103.) The decision was handed down on 11 May 2016 while this chapter (and this book) was in final proof stage. The author is grateful to the publishers for the opportunity to include reference to the decision at this late stage.

³ [1984] 1 Lloyd's Rep 136.

The case was referred to arbitration, and the arbitrators found in favour of the owners. They concluded that the charterers had not given the order as to the precise location where the vessel was to bunker. However, by ordering the vessel to bunker at Las Minas they left it to the refinery which was supplying the bunkers to indicate the bunkering spot. The order given by the refinery to proceed to the bunkering spot was 'within the authority conferred' by the charterers.

The matter came before the Court of Appeal via Robert Goff J, who upheld the tribunal's award. Delivering the *per curiam* judgment of the court, Kerr LJ formulated the question for determination in this way:⁴

On this basis it seems to us that the question of law for the opinion of the Court can be stated in two parts as follows: (a) Were the arbitrators entitled to draw the inferences . . . that the refinery was the agent of the charterers for the purpose of 'indicating the bunkering spot' or of 'selecting the exact place for bunkering as Las Minas', slightly paraphrasing the wording of these findings? (b) If so, on the facts found and the terms of the charter-party, are the charterers liable in damages to the owners for the grounding of the vessel at Las Minas?

The court held that even on the assumption that the refinery was acting as an agent of the charterers for the purpose of indicating the precise bunkering spot, the charterers could not be liable in damages. There was no absolute warranty of safety in the charterparty in relation to every spot within the port of Las Minas. Moreover, the tribunal had not made any finding of negligence on the part of the refinery or the pilot. Thus, the charterers were not liable for the consequences of the grounding.

It was not strictly necessary for the court to consider the issue of delegated performance. Nevertheless, it expressed significant doubts as to the finding of the tribunal and Robert Goff J that the refinery was an 'agent' of the charterers for the purpose of indicating the precise bunkering spot. Kerr LJ said:⁵

[T]he order to bunker at Las Minas was an order to bunker at a safe port. Moreover, in the present case the charterers, through Continental as their local agents, in fact ordered the vessel to a particular place in that port which is also expressly found to have been safe for her . . . It follows that any liability on the part of the charterers in this case must depend upon the inferences and consequences of the agency relationship between them and the refinery on which the arbitrators' conclusion ultimately rests . . .

Although in relation to the charterers, the refinery was in the position of an independent contractor, we naturally accept that for the purposes of the charterers' obligation, under cl 2 of the charter-party, to provide the fuel, the refinery was the agent of the charterers as between the charterers and the owners. The reason is that, in that respect, the refinery was used by the charterers in order to perform one of the charterers' obligations under the contract. We are much more doubtful, however, whether the refinery can also properly be described as the charterers' agent for the purpose of indicating or selecting the ultimate place within the port of Las Minas to which the vessel was to proceed for bunkering, which turned out to be unsafe, particularly when the charterers' agents, Continental, had previously ordered her to proceed to a different and safe place at that port. In this context, as it seems to us, the refinery might well be regarded as performing similar functions to those of a harbourmaster or port authority whose acts would not be treated as the acts of the charterers . . .

4 Ibid. at 140.

5 Ibid. at 140–141.

We therefore consider that the arbitrators' conclusion . . . can be summarized somewhat as follows: 'When a charterer stems bunkers for a vessel from a supplier at a certain port, i.e. orders bunkers for the vessel from the supplier, he impliedly authorizes the supplier to indicate the precise spot within the port where the vessel is to take on her bunkers' . . .

It is therefore only with the greatest misgivings that we proceed on the assumption that question (a), as set out above, can properly be answered in the affirmative, as it was by Mr. Justice Robert Goff.

The court accepted that the refinery was a delegate of the charterers for the purpose of providing fuel to the vessel, which charterers were required to do under clause 2 of the charterparty. However, the court was sceptical (to say the least) as to whether the refinery was also a delegate of the charterers for the purpose of directing the vessel to a bunkering spot within the port of Las Minas. It was not clear that so directing the vessel was a task which had actually been delegated by the charterers to the refinery. Since it was not strictly necessary to determine the issue, the court was prepared to proceed hesitantly on the assumption that indicating a bunkering spot formed part of the obligation to provide fuel. That obligation had been delegated to the refinery.

The second case is *Merit Shipping Co Inc v T.K. Boesen A/S (The Goodpal)*.⁶ The vessel *Goodpal* was time-chartered by Boesen. Boesen then sub-chartered the vessel to Finagrain for a time-charter trip from South America to China. The vessel loaded 33,000 tonnes of soya bean pellets in South America and then sailed for China. At the first discharge port, receivers asked the master to discharge 450 tonnes in excess of the sub-charterers' instructions. The master agreed. When the vessel reached the second discharge port, there was a shortfall in the cargo available to be discharged as against the quantity stated in the bills of lading.

The consignees arrested the vessel. She was released after the owners' P & I club put up a guarantee for \$280,000. The receivers' claim was subsequently settled for \$140,000, and the head owners claimed that amount from Boesen. They argued that clause 8 of the charterparty required the charterers to discharge the cargo. The receivers duly discharged the vessel as the servants or agents of the charterers, and in so doing they over-discharged the vessel at the first discharge port. The shortage at the second discharge port was due to the act, neglect or default of the charterers' servants or agents within the meaning of the Inter-Club agreement.

Colman J rejected the head owners' arguments. He held that the receivers were only Boesen's delegate to the extent that they performed the task of discharging the cargo consigned to the first discharge port. They were not acting as a delegate when requesting that additional cargo be discharged. At any rate, such an order was impermissible and the head owners were not obliged to follow it. With regard to the issue of delegation, his Lordship said:⁷

Just as the charterer can make available to a third party shipper the facility to load the vessel, so also there can be extended to a third party receiver the facility to discharge the cargo at the designated discharging port . . . Once again, the receiver is in

6 [2000] 1 Lloyd's Rep 638.

7 Ibid. at 643–644.

the position of a delegate of the charterer and in that limited sense can be described as the charterers' agent. If therefore he permits the vessel to be discharged in such a way as to damage the ship or other cargo on board, the charterers are obliged to indemnify the owners for loss and damage so caused . . .

The charterers, through their agents, the sub-charterers, did not at any time vary their original instructions, namely to discharge 13,993.90 tonnes at the second port. Nor could they have been entitled to do so. The owners and their master were entitled to refuse to carry out any instruction which placed the owners in breach of their obligations to the holders of the bills of lading referable to the second port. In as much as it was the receivers at the first port who purported to instruct the master what to do with the cargo destined for the second port, they were attempting to interfere with the employment of the vessel in a manner which was not only inconsistent with the charterers' continuing instructions but, had it been authorized by the charterers, would have been impermissible. They stood in the charterers' position only to the extent that they were responsible for carrying out the discharging operation at the first port and the only permissible discharging operation was that in respect of 19,006.01 tonnes. Once that had been accomplished they were no longer the delegates of the charterers and there were no further orders that they could properly give to the master. Moreover, at no time could it be the case that they had anything whatever to do with reducing the quantity of cargo to be discharged at the second port. That was simply not a responsibility which could have been delegated to them by the charterers.

It can be seen that *The Mediolanum* and *The Goodpal* provide a consistent line of authority for the proposition that the charterers of a vessel are not responsible for all acts and omissions of their delegates. They are responsible only in so far as the relevant acts or omissions fall within the scope of the delegated contractual obligation.

4.2.2 *The Adelfa and The Andra*

The line between acts or omissions which fall within the scope of the delegated contractual obligation and those which do not can be a fine one. The point is well illustrated by the final two cases, both of which concerned self-induced frustration.

In *Adelfamar S.A. v Silos E Mangimi Martini S.p.A. (The Adelfa)*,⁸ the vessel *Adelfa* arrived at Triplo carrying a cargo of maize on 21 August 1981. No discharging berth was available and laytime expired on 12 September while the vessel was waiting to discharge. A berth eventually became available on 19 October, but no sooner had discharge commenced than it was stopped. The receivers refused to take delivery of the maize on account of alleged wet damage.

On 28 October, the receivers arrested the vessel in support of their claim for breach of the contracts evidenced by the bills of lading. On 2 November, the local authorities imposed a ban on the landing of the maize. The receivers' claim was upheld by the local court on 26 November, and judgment in the amount of \$3.7 million was given in their favour.

The owners obtained the release of the vessel by coming to an arrangement with the receivers and a third party. The third party supplied a fresh cargo of maize to

8 [1988] 2 Lloyd's Rep 466.

the receivers, in exchange for which the receivers released the vessel from arrest. The original cargo was then delivered to the third party in Singapore, and the owners made a payment of \$2.5 million to the third party. The owners sought to recover that amount from the charterers of the vessel.

The umpire found that the charterparty was frustrated by the ban on discharge, at the latest by the date of judgment of the court in Tripoli. The owners appealed to the High Court. One of the arguments they advanced was that the frustration was self-induced, since it was brought about by the receivers, for whose acts the charterers were responsible under the charterparty.

On appeal, the High Court upheld the umpire's finding that the voyage charterparty was frustrated by the ban on discharge and dismissed the argument that any such frustration was self-induced. Evans J said:⁹

The charterers having undertaken, subject to exceptions, that the cargo will be discharged within the agreed period, they will clearly be liable if this is not done, notwithstanding that the discharging operation has become the responsibility of the receiver or of some other party and the charterer plays no part in it himself. Even if this can properly be described as delegating the charterers' contractual duty, it does not follow that the charterer becomes responsible, vicariously or otherwise, for the receivers and all that they do, or fail to do. The charterer can only be liable when there has been a failure to achieve what the charterers undertook to the shipowner would be done. There was, of course, a failure to discharge within the laytime, for which the charterers are liable in damages or in demurrage. The vessel was detained by her arrest and the subsequent judgment. There is no undertaking in the charter-party, express or implied, that cargo receivers will not arrest the vessel, or seek to do so, at the discharging port.

Thus, the charterers were responsible for the actions of the receivers in so far as they fell within the scope of the delegated contractual obligation to discharge the vessel. However, the arrest of the vessel by the receivers fell outside the scope of the obligation to discharge the vessel and so was not an act for which the charterers were responsible.

In the course of his judgment, Evans J also rejected a further argument by the owners that the charterers implicitly undertook in the charterparty that the vessel would not be detained, save for the purposes of discharge, by the charterers or those who undertook the discharging operation on their behalf. He held that there was no basis for any such implied obligation.¹⁰

In *DGM Commodities Corporation v Sea Metropolitan SA (The Andra)*,¹¹ a vessel was voyage-chartered for the carriage of a cargo of frozen chicken from the United States to St Petersburg. The vessel arrived at St Petersburg on 26 December 2007, but discharge was delayed and laytime expired on 4 January 2008 while the vessel was waiting to berth. The charterers had sold the cargo on terms which provided for the release of the cargo only upon payment from the Russian receivers, which was not immediately forthcoming. When discharge eventually

⁹ Ibid. at 471.

¹⁰ Ibid. at 471–472.

¹¹ [2012] EWHC 1984 (Comm); [2012] 2 Lloyd's Rep 587.

commenced on 8 April 2008, some of the cargo was found to have been contaminated with gas oil which had leaked from an adjacent deep bunker tank.

Demurrage was interrupted from 14 April 2008 onwards, the cause of the delay from that time being the unseaworthiness of the vessel. The following day, the receivers demanded a cash settlement of \$2 million. The owners offered security in the form of a letter of undertaking from either their P & I Club or their parent company, but the receivers refused to accept security. They took no further steps to discharge the cargo until a cash settlement was paid by the owners in October 2008.

On 21 April 2008, the local veterinary service had attended on board the vessel and issued an order which temporarily prohibited the discharge of the cargo. The prohibition was capable of being brought to an end only by a further order from the veterinary service. On 21 October 2008, the owners and the receivers reached an agreement for the cargo to be re-exported on the vessel. The owners paid the receivers a cash settlement of \$2.3 million in order to secure the release of the vessel. On 13 November 2008, the local veterinary service granted permission for the re-export of the cargo.

A dispute arose under the charterparty regarding the charterers' liability for demurrage. The matter was referred to arbitration. The tribunal found that the cargo receivers should have been prepared to accept a Club letter of undertaking, but that a reasonable period for agreeing the terms of such an LOU would not have expired until 25 April 2008. Accordingly, from 15 April until 25 April, the cause of the delay was not the charterers' failure to unload the cargo, but the necessity for the terms of the LOU to be negotiated. In respect of that period, the owners' breach was still causative of the delay and the charterers were not liable for demurrage.

With regard to the remainder of the delay, the tribunal found that the real reason for the continued failure to discharge the cargo was the receivers' desire to have a cash settlement for the cargo claim, to the exclusion of any other form of settlement. It could not be said that the owners should have acceded to the receivers' requests earlier than they did, nor did the conduct of the receivers constitute a frustrating event. The charterers were, therefore, liable for demurrage.

The charterers appealed to the High Court on the issue of whether any frustrating event which had occurred was self-induced because they were responsible for the receivers' acts. The question of law for determination was framed as follows:

Where a voyage charterparty is delayed without the fault of either party, in circumstances that would otherwise amount to frustration, but where those delays are in part caused and/or contributed to by the action or inaction of the cargo receivers (not being parties to the charterparty), is the charterparty frustrated? Or does that action or inaction mean that what would otherwise be frustration is 'self induced' by charterers, such that charterers cannot contend that the charterparty is frustrated?

Before the High Court, the charterers argued that the tribunal had erroneously treated the charterers as vicariously liable for the acts of the receivers in insisting upon a cash settlement. While the charterers were generally liable for a failure to discharge the cargo because that was within the ambit of what had been delegated

by the charterers to the receivers, in this case the relevant conduct fell outside the ambit of the delegated obligation. They argued that the tribunal should have followed the decision in *The Adelfa*.

Referring to the question of law as formulated for determination by the court, Popplewell J observed:¹²

The question of law as formulated for this appeal is not capable of a simple yes or no answer, as was apparent from the dichotomy drawn in . . . oral submissions between conduct in failing to discharge and other conduct . . . In the event, the tribunal's finding that the relevant conduct of the receivers, causing what would or might otherwise have been a frustrating event, was a failure to discharge the cargo means that the relevant question of law is whether such conduct on the part of receivers prevents charterers from relying on what would otherwise be a frustrating event as relieving it from the obligation to pay demurrage. The answer to that question is yes.

His Lordship held that the relevant conduct of the receivers, which prevented the veterinary service's order operating as a frustrating event, was a failure to discharge the cargo. The case could therefore be distinguished from *The Adelfa*. This was not a case about the vessel being prevented from sailing away, or a delay being caused by something preventing the re-export of the cargo, as was the case in *The Adelfa*. The tribunal's findings were that the veterinary service's order prevented discharge, but not re-export. The charterers could not rely upon the failure to discharge the cargo in time as a frustrating event.

Referring to the judgment of Evans J in *The Adelfa*, Popplewell J said:¹³

It is important to note that in that case the claim being addressed . . . was not a claim for demurrage, or for detention of the vessel by virtue of a failure to discharge the cargo . . . In several passages in the judgment it is recorded that the detention of the vessel was caused by its arrest, and the umpire had found that from the moment of the judgment (which he held to be the date of frustration), there was no further possibility of discharge; the court had decided that the receivers were entitled to a money sum representing the value of the cargo, rather than (as the court found, wet damaged) cargo itself. The *Adelfa* was not, therefore, a case in which the relevant activity of the receivers was a failure to discharge the cargo. On the contrary the claim by owners was in respect of the receivers' conduct in arresting the vessel and was a claim for the cost to the owners of securing release from arrest to allow the vessel to leave the port. It was a claim for the consequences of the vessel being prevented from sailing away, not being prevented from discharging her cargo, and it was not a demurrage claim. A charterer undertakes in the charterparty to discharge the cargo, and will be liable in demurrage or damages for detention if the cargo is not discharged, notwithstanding that the function of discharging has been delegated to receivers as its agent. By contrast, the charterer gives no undertaking that cargo receivers will not arrest the vessel, and such arrest is not attributable to charterers. The distinction drawn by Evans J . . . is between a failure to discharge, for which a charterer is liable because it is his personal contractual undertaking, and an arrest preventing the vessel sailing away, in respect of which the charterer gives no undertaking vis-à-vis the conduct of receivers.

The *Adelfa* does not assist the charterers in the present case because the present case is not concerned with a frustrating event which prevented the sailing away of the vessel. The findings by the tribunal in this case were that the conduct of the receivers

¹² Ibid. at [28].

¹³ Ibid. at [26]–[27].

prevented the cargo being discharged. It falls fairly and squarely within the category identified by Evans J of a failure to discharge within the laytime ‘for which the charterers are liable in damages or demurrage’.

The crucial difference between *The Adelfa* and *The Andra* is the distinction between a failure by cargo receivers to discharge the vessel and a failure to abstain from preventing the vessel from sailing away. In the former case, the receivers’ conduct falls within the scope of the delegated contractual obligation to discharge the vessel. In the latter, it does not. The distinction may be a fine one, but it emphasises the importance of applying the correct factual analysis in each case.

4.2.3 *Conclusions on the ‘delegate’ principle*

The four cases referred to above indicate that the ‘delegate’ principle necessitates a three-stage approach. First, the relevant contractual obligation must be identified. Second, it must be identified to whom that obligation has been delegated. Third, and most importantly, it is necessary to analyse what it is that the third party did or failed to do in performance of that delegated contractual obligation. Only if the relevant conduct of the third party falls within the scope of the delegated contractual obligation will the contractual party be responsible for that conduct.

4.3 Overriding contractual ‘definitions’ in pursuit of the ‘delegate’ principle

In some cases, the contracting parties may seek to define the relevant actors for whose acts or omissions the contracting party may be responsible. Such definitions vary in their degree of precision. For example, the contract may simply refer to ‘the party’ or ‘the party, its servants or agents’. On the other hand, it may refer to ‘the seller’s supplier’ or ‘the charterers or their sub-charterers’. However, the courts have been prepared to override such contractual definitions in pursuit of the ‘delegate’ principle. This can be seen from the case of *The Crudesky*.¹⁴

4.3.1 *The facts of The Crudesky – padlocks and dastardly acts*

The case concerned the Akpo FPSO terminal which opened in April 2009, 106 miles south-south-west of Port Harcourt. The production rights in the Akpo oilfield were held by a consortium including China National Offshore Oil Corporation (CNOOC). The operator of the Akpo terminal was Total Upstream Nigeria Ltd (Total). The Nigerian authorities were always concerned about possible theft of crude oil and required an official from the Nigerian Department of Petroleum Resources (the DPR) to be present during the loading of vessels.

On or about 29 July 2009, China Offshore Oil (Singapore) International Pte Ltd (COOSI) sold one million barrels of Akpo Condensate to Vitol Asia Pte Ltd on FOB terms. Shortly thereafter, Vitol Asia sold the same quantity on the same

¹⁴ [2013] EWCA Civ 905; [2014] 1 Lloyd’s Rep 1.

terms to Vitol SA. On or around 10 August 2009, the same quantity was sold to Trafigura Beheer BV (Trafigura) also on FOB terms.

Trafigura agreed a charterparty of the vessel *Crudesky* on an amended BPVOY3 form with the Great Elephant Corporation (Great Elephant). The vessel arrived at the Akpo terminal on 29 August, but on that date the representative of the DPR left the terminal without informing Total and without the permission or approval of the DPR office in Port Harcourt. The vessel gave notice of readiness, and laytime commenced on 30 August.

On 31 August, the vessel berthed and the hose was connected, but loading could not begin because the export valve was padlocked and no DPR representative was present with a key to unlock it. A representative of Total, Mr Bankole, telephoned the DPR office at Port Harcourt and was told that the new DPR representative, Mr Idoniboye, would arrive the following day. Mr Bankole asked whether it would be possible to commence loading without the DPR representative present. He believed that during the course of the telephone call, the DPR office in Port Harcourt had given him permission to sever the padlock. The padlock was cut. Loading began.

The new representative from the DPR, Mr Idoniboye, arrived on 1 September. On the same day, Total's office requested written clearance for loading from the DPR office in Lagos. Clearance was given, but was subsequently revoked at about the same time the vessel completed loading. The vessel was disconnected from the hose, unmoored and began to drift. She could not leave because she had not received documents evidencing the loading of the cargo.

Laytime expired on 3 September. On 7 September, the DPR office in Lagos gave instructions for the vessel to be detained by the navy pending the resolution of the dispute. On 9 October, the Nigerian Ministry of Petroleum Resources wrote to Total requiring them to pay a 'fine' of \$12 million and to discipline the personnel who had 'perpetrated the dastardly act'. On 13 October, Total paid the fine and the vessel was released. She sailed on 16 October.

4.3.2 The legal arguments

At first instance, Teare J held that the vessel was on full demurrage from 3 September, when laytime expired, until 7 September, when the navy detained her. Thereafter, she was only on half demurrage by reason of a 'restraint of princes' clause in the charter. He further held that Trafigura could claim that their vendors had failed to give them quiet possession of the cargo, but that Vitol and COOSI could rely on force majeure clauses exempting them from governmental interference or unforeseeable consequences as from 7 September to 16 October.

The case reached the Court of Appeal. Great Elephant claimed demurrage from Trafigura. Trafigura relied on a demurrage exception in the charterparty but at any rate sought to pass on the liability to Vitol under the contract of sale. Vitol relied on a force majeure clause, but sought to pass on any liability to COOSI under their contract of sale. COOSI sought to rely on a force majeure clause in the contract of sale but did not seek to pass on liability to the ultimate sellers, CNOOC.

The force majeure clause in the charterparty upon which Trafigura sought to rely was contained in clause 21. It provided that the vessel would be on half demurrage if a delay was caused by a restraint of princes which was ‘not within the reasonable control of Charterers or Owners or their respective servants or agents’.

The force majeure clause in the contract of sale between Trafigura and Vitol was contained in article 21 of the NNPC terms. It provided that neither party would be liable for any failure or delay in the performance of its obligations if such performance was delayed or hindered by ‘an unforeseeable act or event which is beyond the reasonable control of either party’.

The force majeure clause in the contract of sale between Vitol and COOSI was contained in section XII.1 of the Total Crude FOB Terms (2007). It provided that neither party would be liable for any failure, omission or delay which arose from ‘any cause reasonably beyond, or to be treated as reasonably beyond, the control of that party’.

Thus, in relation to each of the three force majeure clauses relied upon, it was necessary for the Court of Appeal to consider whose ‘reasonable control’ the relevant event needed to be ‘beyond’. Did each force majeure clause excuse the party to the contract in which the clause was contained for events beyond the personal control of that party, taken in isolation, or did they extend to other parties in the chain? If the latter, how far along the chain did the force majeure clauses extend, and within what scope?

4.3.3 *The pre-Crudesky authorities*

Prior to the Court of Appeal’s decision in *The Crudesky*, the relevant authorities were the decision of the same court in *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum S.A. (No 2) (The Marine Star)*¹⁵ and an *obiter dictum* of Moore-Bick J (as he then was) in *Fyffes Group Ltd & another v Reefer Express Lines Pty Ltd & another (The Kriti Rex)*.¹⁶ The two cases were heard one month apart. Although *The Marine Star (No 2)* was the earlier decision, it was not cited in *The Kriti Rex*, probably because it was not reported until after the judgment had been delivered in the latter case.

In *The Marine Star (No 2)*, the sellers of a cargo of Russian oil, VTT Vulcan Petroleum S.A. (Vulcan), nominated a cargo on board the vessel *Marine Star* to satisfy the contract of sale with Coastal (Bermuda) Petroleum Ltd (Coastal). Vulcan subsequently purported to withdraw that nomination and used the cargo on the *Marine Star* to perform a contract with a different buyer. It was not able to provide any other cargo to Coastal.

Coastal had contracted with an associated company, Coastal Aruba Refining N.V. (Coastal Aruba), to provide fuel oil for use in a refinery. Coastal claimed to

¹⁵ [1996] 2 Lloyd’s Rep 383.

¹⁶ [1996] 2 Lloyd’s Rep 171.

have entered into a ‘back to back’ sale with Coastal Aruba under which they had passed on the nomination from Vulcan and had become liable for non-delivery.

One of the arguments advanced by Vulcan was that Coastal was relieved of any liability to Coastal Aruba by the force majeure clause in the contract of sale between those two parties. Although Vulcan could not rely upon the force majeure clause in its contract with Coastal, because Vulcan’s inability to deliver the cargo was self-induced, the same was not true as between Coastal and Coastal Aruba.

The force majeure clause provided:

Neither party shall be liable for any breach, delay or non-performance hereunder which directly or indirectly results from or is caused, in whole or in part . . . by breakdown or injury to . . . facilities of the seller or those from whom the seller obtained products purchased hereunder . . . or other impairment or interference with sellers means of supply . . . or which directly or indirectly results from any cause beyond sellers’ or buyers’ control, whether such other causes be of the classes herein specifically provided or not.

The issue was therefore whether the actions of Vulcan were ‘beyond sellers control’ as between Coastal and Coastal Aruba, or whether Vulcan’s actions were to be taken to be Coastal’s actions for the purposes of the force majeure clause.

Mance J (as he then was) held in favour of Coastal:¹⁷

In my judgment the plaintiffs [Coastal] would not have been and are not entitled to rely on the force majeure clause in the circumstances of this case to negative any liability on their part towards Coastal Aruba. The main reason for this conclusion lies in the essentially back-to-back nature of the contract between the plaintiffs and Coastal Aruba. The *raison d’être* of that contract was, on the evidence and as a matter of common sense, to ensure a ‘flow of contracts’ putting the plaintiffs and Coastal Aruba in the same position vis-à-vis each other as the defendants and the plaintiffs were towards each other. The force majeure clause was present in the contract between the plaintiffs and Coastal Aruba in case the defendants could rely on the force majeure in their contract with the plaintiffs to set up defences against Coastal Aruba when the defendants had none vis-à-vis the plaintiffs; as the present case demonstrates, it would work to the detriment of the Coastal group rather than to its intended advantage if it were to be construed as having an independent operation of such a nature . . .

However this leaves for consideration whether a cause is in the present context to be regarded as beyond sellers’ control when it consists in simple default by the defendants as the sellers’ own seller under a contract with which the present was intended to be and was effectively back-to-back. I have no hesitation in concluding that it should not be so regarded, because it would conflict with the nature and purpose of the contractual scheme if it were.

The decision was reversed by the Court of Appeal. Saville LJ, with whom Nourse and Hutchison LJ agreed, held:¹⁸

First, it seems to me that the word ‘seller’ or ‘sellers’ means and can only mean the selling party in the relevant contract containing the force majeure clause, and does not refer to sellers further up the chain . . .

Secondly, I do not accept the suggestion that in ‘back to back’ cases, all those concerned are contracting on the basis that liabilities will necessarily be passed all the way

¹⁷ Ibid. at 385.

¹⁸ Ibid. at 386–387.

up or down the chain. Certainly this could be said to be, as the Judge put it, the 'raison d'être' of the form of the contract between the respondents and their associated company, but this does not help if such an intention cannot be derived from the words the parties have used.

Thirdly, the argument based on 'back to back' contracts really involves the unacceptable proposition that the meaning of the words used will change if and when the string is created, which will often only happen after the contract is made, when the same nomination or declaration is passed down the line.

Finally, while I am prepared to accept that in general terms the clause can be said to be designed to deal with 'fortuities,' I can see no basis for distinguishing between immediate and more distant sources of supply. In either case, so far as the sellers are concerned, there has been a fortuitous event preventing them from performing.

In *The Kriti Rexi*, Fyffes Group Ltd (Fyffes) bought bananas from the Banana Control Board of Belize (BCB). As part of the arrangements for shipping bananas to Europe, Fyffes entered into a contract of affreightment with Reefer Express Lines Pty Ltd (REL). Under that contract, REL were to provide refrigerated vessels to load bananas. In order to satisfy that obligation, REL time-chartered the vessel from Reefkrit Shipping Inc (RSI).

The vessel *Kriti Rex* was carrying a cargo of bananas when she experienced main engine problems. The master decided to declare general average and proceed to a port of refuge, instead of proceeding to the second and third load ports where the intention was to load more bananas. By the time the vessel was ready to continue on the voyage, the bananas already on board were no longer fit to complete the voyage. There was no market for them locally, so they were donated to the Honduran Red Cross. The bananas which were waiting at the second and third load ports were carried on a different ship.

The contract of sale between Fyffes and BCB contained a force majeure provision at clause 15.3. It stated:

The term 'force majeure' as used herein shall include: Acts of God, strikes . . . and other events beyond the control of the parties which affect the production, sale, shipping, exportation . . . of bananas either to, at, or from the place of exportation.

As a defence to part of the claim brought by Fyffes, REL argued that Fyffes was entitled to rely upon clause 15.3 as against BCB. The question was whether the breakdown of the vessel was 'beyond the control of the parties' as between Fyffes and BCB. Moore-Bick J said, *obiter*.¹⁹

I think it fair to approach such clauses with the presumption that the expression force majeure is likely to be restricted to supervening events which arise without the fault of either party and for which neither of them has undertaken responsibility. However . . . the question is one of construction and in each case close attention should be given to the language of the clause itself while paying due regard to the nature and terms of the contract as a whole . . .

The bananas were sold on f.o.b. terms and as between themselves and BCB it was Fyffes' responsibility to obtain a ship and tender her for loading at the appropriate time and place.

19 [1996] 2 Lloyd's Rep 171 at 196.

Moore-Bick J therefore seemed to consider, contrary to the Court of Appeal's view in *The Marine Star (No 2)*, that the actions of RSI and REL were to be taken to be Fyffes's responsibility as between them and BCB. Accordingly, the breakdown was not 'beyond the control of the parties', and clause 15.3 would not apply.

Professor Treitel has suggested that the decision in *The Kriti Rex* can be explained either on the basis that the specific examples enumerated in the force majeure clause showed that it was not intended to protect the buyer in the event of delays resulting from a breach of the contract of carriage between the buyer and the carrier, or alternatively on the basis that the buyer was not protected by the force majeure clause from a breach by the carrier, because the obligation to provide a ship under the contract of sale had been delegated to the carrier.²⁰

In *The Crudesky*, the Court of Appeal sought to reconcile the two previous decisions on the basis that no issues of delegated performance arose in *The Marine Star (No 2)*. Longmore LJ held:²¹

It is noteworthy that [the court in *The Marine Star (No 2)*] was not considering the case posited by Moore-Bick J in *The Kriti Rex*, namely whether, if the relevant party was himself contractually responsible for a relevant part of the carrying out of an international sale contract, he could nevertheless rely on the absence of control of the party to whom he had delegated his responsibility. The cif contract in *The Marine Star* was a straightforward sale of goods . . . so questions of delegation of personal contractual responsibility did not arise. I do not therefore consider that *The Marine Star* in any way inhibits this court from approving the approach of Moore-Bick J in *The Kriti Rex* . . .

4.3.4 *The Court of Appeal's decision in The Crudesky*

In *The Crudesky*, the Court of Appeal took the starting point that the answer depended upon the construction of the wording of each particular force majeure clause. Longmore LJ, with whom Tomlinson and Underhill LJ agreed, held:²²

It goes without saying that a force majeure clause must be construed in accordance with its own terms; it also need hardly be emphasised: (a) that it is an exceptions clause and any ambiguity must be resolved against the party seeking to rely on it and (b) that the concept of being 'beyond [a corporate person's] control' sets a comparatively high hurdle since corporations usually do have a significant measure of control over their own business.

In relation to the dispute under the charterparty between Great Elephant and Trafigura, the question was whether Total was the 'servant or agent' of Trafigura as charterer of the vessel. The court held that it was:²³

A literal constructionist might say that strictly speaking Trafigura delegated the loading operation, for which they were responsible under the charterparty, to Vitol SA who

20 G. H. Treitel, *Frustration and Force Majeure* 3rd edn. (Sweet & Maxwell, 2014), para. 12–030.

21 [2013] EWCA Civ 905; [2014] 1 Lloyd's Rep 1 at [39].

22 Ibid. at [25].

23 Ibid. at [29]–[30] per Longmore LJ.

were their 'agents' for the purpose of clause 21 and that the delay to the vessel was beyond the control of themselves (Trafigura) and their agents Vitol SA. The fact that Vitol SA delegated the loading operation to Vitol Asia Pte Ltd, who would for this purpose be Trafigura's sub-agents, and that Vitol Asia Pte Ltd delegated it to COOSI who would for this purpose be Trafigura's sub-sub-agents and COOSI then delegated it to Total, who would for this purpose be Trafigura's sub-sub-sub-agents, does not make Total Trafigura's agents for the purpose of a clause which does not refer to sub-agents at all.

This to my mind would be strict construction with a vengeance . . . The intention of the charterparty was that if anything went wrong with the loading operation for any reason, the liability for demurrage could not be passed down the line to COOSI. The intention of the charterparty was that if anything went wrong with the loading operation for any reason, that was the charterers' responsibility . . . by contracting with Vitol SA, Trafigura initiated (or participated in) a chain of contracts which led to the actual loading of the vessel being done by Total. If the events that occurred were within the (reasonable) control of Total, then Trafigura should be contractually liable to the owners of the vessel for the consequences of those events. In other words, for the purpose of clause 21 of the charterparty, Total are the agents of Trafigura in relation to the loading of the cargo.

As between Trafigura and Vitol, the question was whether Total was comprised within the term 'either party' as used in the force majeure clause in article 21. The court held that it was.²⁴

In the first place the seller's obligation is to place the cargo 'free on board' the vessel. This necessarily means that Vitol was responsible for the operation of putting the oil cargo on board vis-à-vis Trafigura, just as much as Trafigura was responsible vis-à-vis the owners under the charterparty. Subject to the considerations dealt with below, that must mean that Vitol are responsible for anything that goes wrong during the loading operation subject to any exclusion clauses in the sale contract. The fact that the force majeure clause refers to acts or events beyond the reasonable control of 'either party' means therefore beyond the reasonable control of that party or any party to whom the contractual performance of that party's obligation has been delegated by that party.

The court acknowledged that this was a potentially controversial construction of the force majeure clause.²⁵ It adopts an expansive definition of 'either party', including within that term any party in the contractual chain which performs a delegated contractual obligation of any other party, regardless of the degree of remoteness between them.

Finally, as between COOSI and Vitol, the issue was whether Total was comprised within the term 'that party' used in Article XII.1 of the Total Terms. Although at first glance this was the same enquiry as between Trafigura and Vitol, the position was rendered somewhat more complicated by the fact that the Total Terms expressly distinguish between phrases such as 'the Seller', 'the Seller's Supplier', the 'Loading Terminal' and the 'Loading Terminal Operator'. This arguably militated for a narrower construction of the term 'that party' in the Total Terms, since the terms

²⁴ Ibid. at [33] per Longmore LJ.

²⁵ Ibid. at [34] per Longmore LJ.

referring to different entities were specifically and exclusively defined. Nevertheless, the court held that Total was comprised within the term ‘either party’:²⁶

In the charterparty in the present case Trafigura had undertaken the responsibility of loading the vessel and, in the respective fob sale contracts, Vitol and COOSI had likewise undertaken that responsibility. It is for that reason that I have already said that Vitol and COOSI cannot rely on the force majeure clause unless they can show that the relevant acts or events were beyond the reasonable control of Total, being the person who discharged that responsibility.

4.3.5 *Conclusions on The Crudesky*

The effect of the Court of Appeal’s decision is that, in the context of a chain of contracts, force majeure clauses which refer to events ‘beyond the reasonable control of either party’ (or similar such wording) will almost always extend beyond the actual control of the contracting party to the control of any other party through whom the contracting party performs the contract or to whom it delegates part of the performance. Unless very clear language is used, words such as ‘agent’ will be given a wide meaning.

4.4 Does it actually matter what the ‘delegate’ is doing?

The problems regarding responsibility for delegated contractual performance came to a head in the recent case of *The Global Santosh*.²⁷ The dispute involved issues both as to the type of acts for which the contractual party will be responsible and the relevant actors for whose acts or omissions the contractual party will be responsible.

4.4.1 *The facts of The Global Santosh – unloader problems and mistaken arrests*

The vessel *Global Santosh* was chartered by NYK Bulkship Atlantic NV (‘NYK’) to Cargill International SA (Cargill’) for a one time-charter trip from Sweden to West Africa. Cargill sub-chartered the vessel to Sigma Shipping Ltd (Sigma) by way of a voyage charter. The cargo was one of six shipments of cement sold by Transclear SA (Transclear) to IBG Investment Ltd (IBG). Pursuant to the terms of the contract of sale, IBG was responsible for unloading the cargo and was liable to pay Transclear demurrage if unloading was delayed. Transclear was also a sub-charterer of the vessel under a voyage charter, although it was not clear whether that was by way of a charter with Sigma or not.

The vessel arrived at Port Harcourt on 15 October 2008 but was held at anchor due to congestion caused in part by the breakdown of IBG’s unloader. On 18 December 2008 she was called to berth, but was sent back because Transclear had arrested

²⁶ Ibid. at [37] per Longmore LJ.

²⁷ [2016] UKSC 20; on appeal from the Court of Appeal ([2014] EWCA Civ 403; [2014] 2 Lloyd’s Rep 103).

the cargo in order to secure a claim for demurrage. By an ‘obvious mistake’, the arrest order also named the vessel as the object of the arrest. Following an agreement as to demurrage and a court order releasing the vessel and cargo, discharge commenced on 15 January 2009.

Cargill paid hire for the period during which the vessel was detained by the unloader problems, but withheld hire for the period of the arrest on the basis that the vessel was off-hire pursuant to clause 49 of the charterparty. Clause 49 provided:

Should the vessel be captured or seizure or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended until the time of her release, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for Owners’ account.

In broad terms, the case concerned the issue of whether the arrest was ‘occasioned by any personal act or omission or default of the Charterers or their agents’ so that the proviso to clause 49 applied. NYK contended that it did, since the detention was occasioned by the personal act or omission of IBG and/or Transclear, who were agents of Cargill. Two questions arose: first, were Transclear and/or IBG agents of Cargill for the purpose of clause 49; second, what acts were within the scope of the proviso.

4.4.2 *The LMAA tribunal’s award*

A majority of the LMAA arbitrators found that Transclear was not performing Cargill’s obligation to unload the vessel when it arrested her and that, even if it was, it did so not as an ‘agent’ but as a ‘sub-contractor’. Cargill had no interest in the arrest and it was not an act relating to Cargill in any way. Transclear was acting solely on its own behalf and for its own unrelated interests. Accordingly, the clause 49 proviso did not apply and the vessel was off-hire. The tribunal arguably failed to consider the position with regard to IBG.

4.4.3 *Field J’s judgment*

On appeal to the High Court pursuant to section 69 of the Arbitration Act 1996, Field J adopted an approach similar to that of the Court of Appeal in *The Crudesky*. His Lordship held that the term ‘agent’ was to be widely construed.²⁸

Parties such as sub-charterers or sub-sub-charterers or receivers to whom Cargill, by subletting the vessel, had delegated or sub-delegated the performance of its responsibilities under the charterparty can be Cargill’s agents for the purposes of the proviso, irrespective of the precise contractual relationship existing between the delegate and the party above him in the contractual chain.

28 [2013] EWHC 30 (Comm); [2013] 1 Lloyd’s Rep 455 at [19].

However, his Lordship also rejected NYK's argument that it was sufficient for the act or omission of the delegate to have been causally linked to the detention of the vessel in order for the proviso to apply, holding instead that:²⁹

[T]he proviso will only apply where the act or omission or default of such a delegate occurs in the course of the performance by the delegate of the delegated task.

It followed that the proviso did not apply to Transclear's acts because, as the majority of the tribunal had found, the act of arresting the cargo and the vessel was not done in the course of carrying out any responsibility which had been delegated to Transclear by Cargill.

However, Field J went on to consider the position with regard to IBG, which he held was also Cargill's delegate for the purposes of Cargill's obligation to unload the vessel pursuant to clause 8 of the charterparty:³⁰

IBG became Cargill's delegate of the obligation to unload under clause 8 by reason of the sale contract, including its demurrage provisions and in my judgment, for the purposes of the clause 49 proviso, the failure to unload within the laydays was an act, omission or default that occurred in the course of performing the obligation to discharge as delegated to it by Cargill. It was Cargill after all who set in train the process of delegation and gave delegating parties a free hand to agree terms with delegates. I am also of the view that IBG's failure to pay demurrage or to secure Transclear's claim occurred in the course of IBG's performance of IBG's delegated task because IBG's obligation to carry out the process of unloading included the obligation to meet all necessary expenses to clear obstacles to performing that task that resulted from IBG's own failure to get on and unload the cargo.

It was then necessary to determine whether IBG's acts or omissions had 'occasioned' the arrest. Field J decided that the question of causation must be remitted back to the arbitrators for them to determine.³¹ The obvious difficulty with Field J's approach *vis-à-vis* IBG, quite apart from looking at other contracts with which Cargill had nothing to do, was that he effectively applied a broad allocation of responsibility approach. The judge's only stated reason for relying on the sale contract rather than confining himself to the Charterparty was that 'It was Cargill after all who set in train the process of delegation and gave delegating parties a free hand to agree terms with delegates.' But that was NYK's argument that the charterers are to be fixed with responsibility for everything done by anyone 'on charterers' side of the line' which the judge had just rejected.

4.4.4 *The Court of Appeal's decision*

The case then proceeded to the Court of Appeal. Gross LJ, with whom Gloster LJ and Sir Stanley Burton agreed, endorsed the wide definition of 'agent' which Field J had applied:³²

²⁹ *Ibid.* at [19].

³⁰ *Ibid.* at [23].

³¹ *Ibid.* at [24]–[27].

³² [2014] EWCA Civ 403; [2014] 2 Lloyd's Rep 103 at [30].

There was no challenge to the judge's conclusion . . . that 'agents' were not to be limited to agents strictly so called; thus, *delegates* of Cargill could be its agents for the purposes of the proviso '. . . irrespective of the precise contractual relationship existing between the delegate and the party above him in the contractual chain'. The word 'agents' was accordingly capable of extending to sub-charterers, sub-sub-charterers and receivers. For my part, the judge's conclusion – and its acceptance by the parties – was realistic.

It followed that the case turned entirely on the construction of clause 49 of the charterparty. In that regard, Gross LJ applied a four-step approach. First, as a matter of language, the proviso identified the relevant actors, namely Cargill or its delegates.³³ Second, the proviso said only that the relevant act, omission or default must be such as occasioned the detention of the vessel.³⁴ Third, the proviso was not open-ended; it applied only to the actors and acts outlined in steps one and two.³⁵ Fourth, the proviso said nothing as to restricting the acts in question to those occurring in the course of the performance by the delegate of the delegated task; the approach of Field J required such wording to be read into the proviso.³⁶

Having made these observations about the exercise of construing clause 49, Gross LJ then reached a critical conclusion as to the operation of the proviso:³⁷

[S]ub-charterers, receivers and others are not, in general, *agents* of time charterers; they will only be agents when entrusted by time charterers with the performance of an obligation of charterers under the charterparty . . . Here, however, once, as is not in dispute, 'agents' can be read as 'delegates', the ambit of the proviso is necessarily widened. Many a 'delegate' will manifestly not be an 'agent', *stricto sensu* . . . If a party (e.g. a sub-charterer) is a delegate of Cargill flowing from the sub-letting of the vessel, that party remains a delegate for the purposes of the proviso regardless of the legal nature of the act or omission (etc). Not every act or omission of the delegate will or need be in the course of performance of the delegated task.

With respect to the learned judge, this reasoning is hard to follow. It conflates the separate issues as to the identity of the relevant actors and the scope of the acts or omissions of the delegates for which Cargill will be responsible. There is no reason why an expansion of the pool of relevant actors to include delegates, not just 'agents' in the strict sense of the word, should have any impact on the scope of the acts or omissions of those delegates which are to be attributed to Cargill. Once this flaw in the reasoning is appreciated, the statement that 'that party remains a delegate for the purposes of the proviso regardless of the legal nature of the act or omission' becomes something of a pronouncement *ex cathedra*.

Gross LJ acknowledged, however, that there might be a possible reservation for an act or omission of a Cargill delegate wholly extraneous or unrelated to subletting under the charterparty or inconsistent with the scheme of the charterparty.³⁸ Such a reservation is difficult to reconcile with his Lordship's previous conclusion that a delegate

³³ Ibid. at [31].

³⁴ Ibid. at [32].

³⁵ Ibid. at [33].

³⁶ Ibid. at [34].

³⁷ Ibid. at [35].

³⁸ Ibid. at [40(ii)].

remained a delegate for the purposes of the proviso regardless of the legal nature of the act or omission. The reasoning appears to be that the legal nature of the act or omission is irrelevant, unless it is ‘wholly extraneous or unrelated’ to the charterparty. At what point an act or omission of a party involved in the performance of the charterparty would cross the line and become ‘wholly extraneous or unrelated’ is not clear.

The implication of the Court of Appeal’s conclusion was that Cargill was responsible for the consequences of Transclear’s arrest and for the provision of security for Transclear’s demurrage claim, notwithstanding that it had no interest in Transclear obtaining that security. Moreover, where a charterer delegates performance of an obligation, it will be responsible for the acts or omissions of the delegate even if they are extraneous to the delegated performance. This analysis of responsibility for the acts or omissions of delegates is even broader than that adopted by the Court of Appeal in *The Crudesky*. It does not sit comfortably with the ‘delegate’ principle established in the four cases referred to in the first section of this paper. Indeed, it potentially marks a significant expansion of that principle.

However, Field J’s reasoning in relation to Cargill’s responsibility for the acts of IBG, founded upon the fact that the laydays under IBG’s purchase contract began with the service of the notice of readiness three months earlier than that and, by sub-chartering the vessel to Sigma, Cargill had set in train the chain of transactions which culminated in the appropriation of the cargo of the *Global Santosh* to that contract was doubted by the Court of Appeal. The Court of Appeal, while not needing to express a view, nevertheless found the approach adopted by Field J. a highly questionable one in principle. Gross LJ stated that it was not possible ‘to match the obligations of a Cargill delegate (whether Transclear or IBG) under a very different contract to a Cargill obligation under the charterparty’.³⁹ The Court of Appeal was correct to do so. No other case in the context of delegated charterparty obligations has sought to analyse the position of the delegate’s performance of the charterparty obligation in terms of the delegate’s own separate contract to which the charterer is *not* party.

4.4.5 The ‘whose side of the line is it?’ approach

The Court of Appeal considered that its approach to the construction of clause 49 was supported by the ‘commercial context’ of the contract, which was the need to distinguish between those matters which fell on owners’ side of the line and those which fell on charterers’ side of the line.⁴⁰ This was said to follow from the decision of Rix LJ in *Hyundai Merchant Marine Co Ltd v Furnace Withy (Australia) Pty (The Doric Pride)*.⁴¹

Furnace Withy (Australia) Pty (Furness Withy) were the disponent owners of the vessel *Doric Pride*. They entered into a trip-time charter of the vessel with Hyundai Merchant Marine Co Ltd (Hyundai). Above the trip-time charter in the chain were two other charterparties, the first between the head owners and the first charterers, the second between the first charterers and Furness Withy.

³⁹ Ibid. at [43(ii)].

⁴⁰ Ibid. at [41] per Gross LJ.

⁴¹ [2006] EWCA Civ 599; [2006] 2 Lloyd’s Rep 175.

The vessel was on her way to New Orleans in order to load a cargo when she was detained by the US Coast Guard. She had been identified as a ‘High Interest Vessel’ or ‘HIV’ because she had not previously called at a US port. The vessel was ordered to anchor at a position in the south-west pass of the Mississippi river. While anchored, there was a serious collision between two vessels which led to the closure of the south-west pass. The vessel was delayed for a period of about six days as a result.

Clause 85 of the charterparty provided:

Should the vessel be captured or seized or detained or arrested by any authority or by any legal process during the currency of this charterparty, the payment of hire shall be suspended until the time of her release, and any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for Owners account, unless such capture or seizure or detention or arrest is occasioned by any person act or omission or default of the charterers or their agents or by reason of cargo carried or calling port of trading under this charter.

The question was whether the vessel was off-hire for the period of delay pursuant to clause 85. At first instance, Mr Peter Crane QC, sitting as a Deputy Judge of the High Court, held that the vessel was not off-hire. The reason for the delay was that the vessel was a first-time caller to the United States, which engaged the ‘calling port of trading’ proviso at the end of clause 85. The owners appealed to the Court of Appeal.

Rix LJ, with whom Brooke LJ and Sir Paul Kennedy agreed, held:⁴²

We are not here concerned with personal act, omission or default of the charterers or their agents . . . It seems to me that when one looks at clause 85 in the context of the other clauses under this charter to which I have referred in this judgment, one sees that there is within the express wording of the particular clauses a basic distinction which the draftsman seeks to make, and which is entirely familiar to owners and charterers, between those matters which lie upon the owners’ side of responsibility, essentially the vessel and crew, which the owners have to provide to the charterers, and those matters relating to the charterers’ employment of the vessel and crew for their trading purposes, which lie upon the other side of the line.

On this basis, Gross LJ concluded in *The Global Santosh* that the actions of Cargill’s delegates fell on its side of the line:⁴³

There can be no doubt in the present case that the acts, omissions or defaults in question, culminating in the detention or arrest of the vessel . . . involved Cargill’s delegates and fell on its side of the line. NYK was not, in any sense, involved in the apparent dispute between Transclear and IBG as to the delay in unloading the vessel.

This reasoning seems to miss the crucial point that the Court of Appeal in *The Doric Pride* was not concerned with the personal acts, omissions or default of the charterers or their agents (as was expressly said by Rix LJ), but rather with a proviso which distinguished between matters which related to the vessel or crew, for which the owners were responsible, and those which related to the cargo or the trading of the vessel, for which the charterers were responsible. The reasoning also assumes that all events will be the responsibility of one contractual party or

⁴² Ibid. at [33].

⁴³ [2014] 2 Lloyd’s Rep 103 at [41].

the other and excludes the possibility of events for which neither party is responsible, where any loss flowing from that event would simply lie where it fell.

4.4.6 *The Supreme Court's review*

Permission to appeal having been refused by the Court of Appeal, Cargill applied for and obtained permission to appeal from the Supreme Court.⁴⁴

In its review of the decision of the Court of Appeal, there were therefore several questions with which the Supreme Court will have to grapple. First, what is the correct meaning of the term 'delegate' if that concept is comprised within the term 'agent'? Secondly, does the term 'delegate' carry within it the traditional distinction established by cases such as *The Adelfa* and *The Andra*? If not, why not? Finally, does the decision of Rix LJ in *The Doric Pride* establish the general commercial context to charterparties which must be given due weight in each case, or was it merely a reflection of how the particular clause in that particular charterparty had been drafted?

The issues on the appeal divided the court, although there was common ground that the Court of Appeal's approach was too wide on any view.⁴⁵ The majority (Lord Sumption, with whom Lords Neuberger, Mance and Toulson agreed) was unable to accept the reasoning of the Court of Appeal and restored Field J's approach, while rejecting his reasoning in relation to the IBG aspect. Dissenting, Lord Clarke adopted a wide construction of the relevant charterparty clauses and would have treated Cargill as responsible for the acts of both Transclear and IBG, although he too was at pains to emphasise that he did not endorse the very wide approach taken by the Court of Appeal, with its potential to open the floodgates.⁴⁶

The Supreme Court's decision can usefully be analysed in a number of propositions which can be identified in the speech of Lord Sumption.

First, and now uncontroversially following the earlier decisions in both *The Goodpal* and *The Crudesky* considered above, references in a time charter to acts of the charterer's 'agents' in the course of performance cannot necessarily be limited to persons doing those acts on his behalf in the strict legal sense of the term, or indeed to those standing in any direct legal relationship with him.⁴⁷ As between the owner and the time charterer, the rights of the time charterer are made available to those further down the contractual chain, and some at least of the time charterer's obligations are satisfied by the acts of subcontractors. Such subcontractors, although standing in no direct legal or contractual relationship with the charterer, must be regarded as, at least in part, the intended subject matter of the term 'agents'.

Second, in the specific context of a charterer's obligation to discharge, persons ultimately carrying out the relevant cargo-handling operation (loading or discharging) are 'availing themselves of the facility contractually derived either directly or indirectly from the charterers' (the court endorsing Colman J's expression to this effect in *The*

⁴⁴ 22 December 2014.

⁴⁵ [2016] UKSC 20.

⁴⁶ *Ibid.* at [55].

⁴⁷ At [19].

Goodpal). They are, to that extent, easily described as the ‘agents’ of the time charterers in the sense in which that word is employed in a provision such as clause 49.⁴⁸

Third, however, it does not follow that everything that a subcontractor or third party ‘delegate’ does can be regarded as the exercise of a right or the performance of an obligation under the time charter. While this was apparently common ground between the majority and Lord Clarke in the minority,⁴⁹ the difference lay in the ability to be able to define with certainty the boundary of what is and is not to be regarded as the exercise of the right, function or obligation. The majority rejected the Court of Appeal’s approach because, while it purported to accommodate a class of actions which would fall outside the ‘agent’s’ scope (‘wholly extraneous or unrelated to sub-letting under the [sub-charter] or inconsistent with its scheme’),⁵⁰ there was no workable basis for such an exception (see above and per Lord Sumption).⁵¹ Where the range of matters for which the time charterer is responsible depends on what functions he has delegated to a subcontractor, it is therefore always necessary to identify the precise extent of the delegation.

For this reason, fourth, the correct question which the court should have posed itself was whether IBG, by omitting to discharge at any time before 15 January 2009, were vicariously exercising rights or vicariously infringing obligations under the time charter between NYK and Cargill.⁵² That could only depend on the terms of the time charterparty and Field J was wrong to treat the terms of the IBG-Transclear contract as if they were applicable in some way as between Cargill and NYK.

Fifth, in the present case, the only thing delegated by means of the chain of sub-contracts to Transclear and then on to IBG was the carrying out of Cargill’s obligation to discharge the vessel. That obligation needed to be analysed carefully: under clause 8, Cargill was required to perform or procure to be performed whatever cargo-handling operations occurred which imported an obligation to ensure that cargo handling was done properly and to pay for it. But, as between themselves and NYK, Cargill had no contractual obligation to procure the vessel to be discharged at any particular time, and no contractual interest in the timing of the operation, being obliged to pay hire regardless of when discharge occurred.⁵³

Sixth, as between NYK and Cargill, such cargo-handling operations as occurred, although carried out by Transclear or IBG, were carried out on Cargill’s behalf, at their orders and expense under clause 8 of the time charter. It was the vicarious exercise of a right of Cargill under the time charter, which Cargill indirectly made available; Cargill would be responsible for the defective performance of cargo-handling operations but not for a failure (by IBG) to discharge the cargo as that was not the vicarious exercise by IBG of some right of Cargill under the time charter. IBG were doing nothing in this period, as far as the vessel was concerned, and were therefore doing nothing on behalf of Cargill under the charterparty.⁵⁴

⁴⁸ *Ibid.*

⁴⁹ Lord Sumption for the majority at [21] and Lord Clarke at [54].

⁵⁰ Per Gross LJ in the Court of Appeal at [40(i)].

⁵¹ At [31].

⁵² At [29].

⁵³ At [27].

⁵⁴ At [28].

Seventh, and in the specific context of construing the arrest proviso, the court stressed that there must be some nexus between the occasion for the arrest and the function which Transclear or IBG was performing as ‘agent’ of Cargill. (The court gave the examples of Transclear or IBG causing the vessel to be arrested in support of a claim to a proprietary interest in it in support of a cargo claim in connection with a sister-ship which would satisfy the nexus.⁵⁵) There was none here. (The attempt to define a satisfactory nexus given by Lord Clarke in his dissenting speech was linked effectively to the third party (IBG) being someone who had become involved in general terms in the carrying out of discharge.)⁵⁶

Eighth, the court was wholly unpersuaded by the Court of Appeal’s attempted distinction between matters falling within the owner’s or the time charterers’ spheres of responsibility or on one or other’s ‘side of the line’. This was akin to treating the delegation by a time charterer such as Cargill as extending to everything that arose out of Cargill’s trading arrangements concerning the vessel and amounted to saying anything that the sub-charterers or receivers may choose to do which results in the arrest of the vessel, becomes the responsibility of the time charterer if the occasion for doing it would not have arisen but for their having come in at the tail end of a chain of contracts which the time charterer initiated. That approach was held to be ‘impossible to justify’.⁵⁷ The court correctly pointed out that a significant problem with the Court of Appeal’s approach was that the ‘different side of the lines’ approach, as Lord Sumption referred to it, the ‘dichotomy’ proposed by the Court of Appeal was the inability to reconcile this with other provisions of the charterparty, both *ad hoc* rider and standard clauses dealing with various subject matters.⁵⁸ The Court of Appeal’s unconvincing attempt at this has been considered above.

In this connection, the Supreme Court confined the application of *The Doric Pride* to the specific context in which Rix LJ had made his remarks; as is suggested above this was the correct reading of that decision given the very different wording of the clause in that case which expressly referred to trading aspects.⁵⁹

4.5 Conclusions

Certain conclusions may be drawn from the cases referred to above. First, the sphere of contractual responsibility in respect of non-delegable obligations extends to the persons to whom a contractual party delegates its performance. Second, there is a clear dividing line between those acts or omissions which are within the scope of the delegation and those which are without. Third, contractual parties which seek to define or limit the persons for whose acts they are responsible face a drafting conundrum: the word ‘agent’ does not mean ‘agent’; very specific wording will be required to achieve such a result.

The decision of the Supreme Court is a landmark one in relation to a contracting party’s responsibility for the vicarious or delegated performance by a third

⁵⁵ At [21].

⁵⁶ Per Lord Clarke, diss., at [47].

⁵⁷ Per Lord Sumption at [31].

⁵⁸ At [32].

⁵⁹ At [32].

party of its contractual obligations, both in the common charterparty and international sale of goods contexts and more generally.

While the Court of Appeal, basing itself on its own view of what it regarded as the more ‘commercial’ reading, inspired by *Rainy Sky* considerations, construed what is, after all, a clause dealing with responsibility defined in terms of *agency* as effectively a type of risk-allocation provision, this approach was always open to question. Many cases establish that one does not start in construing a charterparty clause by assuming it should comply with a particular notionally fair or supposed allocation of risk. In the off-hire clause context, in *The Captain Stefanos*,⁶⁰ Cooke J. rejected the submission that an off-hire clause had to be read ‘with the business purpose and allocation of risk in mind’ that a time charterer bore the risk of piracy,⁶¹ stating ‘the focus must inevitably be upon the off-hire clauses when determining whether an off-hire event has occurred’. He stressed that the initial search had to be for the ordinary and natural meaning of the language used in context.⁶²

The parties, while choosing the word ‘agent’ may, following the approach illustrated in *The Crudesky* and before it *The Kriti Rex*, be taken to be including any delegate through whom they choose to perform their obligations. However, by adopting the concept of agency, however broadly that is to be construed in terms of the answer to the question ‘who is my agent?’, the parties objectively by their language are more realistically to be taken to have imported the concept of acts and omissions within the scope of that agency or delegation, rather than some open-ended liability for effectively whatever the delegate does during the delegation. As Evans J put it in *The Adelfa*, ‘it does not follow that the charterer becomes responsible, vicariously or otherwise, for the receivers and all that they do, or fail to do. The charterer can only be liable when there has been a failure to achieve what the charterers undertook to the shipowner would be done.’⁶³

The Court of Appeal’s ‘sphere of responsibility’ approach, dividing up the risk and allocation for responsibility for, *inter alia*, delay to a vessel under time charter based on some notional appreciation of what it is that an owner and a charterer should bear given their respective commercial interests in the use of the vessel has been a pervasive one.

The same approach divided the LMAA tribunal. Lord Clarke (dissenting), while ostensibly eschewing the wide approach of the Court of Appeal, preferred a wider approach than looking simply at the obligation delegated. He considered it was appropriate to have regard to ‘discharge’ in general having been delegated by Cargill such that Cargill were in charge of the discharging operations, which they then arranged though Transclear and IBG. Since the arrest related to ‘discharge’ in some sense by one or other, in his view, there was still the necessary (unclear, it is respectfully submitted) nexus for the purposes of clause 49.

60 [2012] 2 Lloyd’s Rep 46. See also to like effect: *The Sea Queen* [1988] 1 Lloyd’s Rep 500 per Saville J. at 502; *The Fjordass* [1988] 1 Lloyd’s Rep 336 per Saville J at 340 and *The Berge Sund* [1993] 2 Lloyd’s Rep 453 per Staughton LJ at 459.

61 *Ibid.* at [9]–[10].

62 *Ibid.* at [16].

63 [1988] 2 Lloyd’s Rep 466 at 471.

The Supreme Court's decision restores the orthodoxy. Its decision brings welcome clarity to the concept of vicarious performance and the definition of the limits on responsibility for the 'delegate'. It has provided an interpretation of 'charterer's agents' which confirms the earlier approach in first instance decisions which avoids a potentially open-ended responsibility for, and meaning of, 'agents' which threatened to impact upon other common charterparty provisions using the same expression, e.g. as to the responsibility to put up security in the case of vessel arrest (cf. clause 18 of the NYPE form).

The Supreme Court's decision confirms that allocation of risk for, for example, delay due to arrest is always a matter of drafting (as the variety of bespoke 'arrest' clauses used in practice, ranging from always off hire to never off hire, demonstrate) not resorting to assumed or notional spheres of responsibility. The concept of 'agents' has been used for a reason to denote and define a specific class of person exercising a specific role in a specific set of circumstances.

This is important. As was pointed out by the appellant in argument, there is no one assumed allocation of risk for delay due to arrest. Specific off-hire provisions, like clause 49, are commonly negotiated and agreed between the parties and inserted into the charterparty as an additional rider clause. It is a matter of construction in each case, and resort to over-arching expected responsibilities ignores the wide variety of different drafting solutions available and adopted.

At one end of the spectrum, the off-hire provision may provide that arrests and other specified detentions of the vessel will result in the vessel being off-hire with no exceptions or provisos at all ('capture/seizure, or detention or threatened detention by any authority including arrest').⁶⁴ At the other, the off-hire clause may have the effect that the vessel remains on hire during any arrest or detention unless the same is specifically attributable to the shipowner or the vessel ('should the vessel be seized or detained or arrested or delayed under legal procedure caused by creditors related to owners and/or the vessel, all time lost thereby be treated as off-hire until time of her release').⁶⁵ Clauses like clause 49 fall between these two positions, making arrest of the vessel in general an off-hire event, but providing for certain defined circumstances in which the arrest comes about which are nevertheless to be taken as not interrupting the running of hire. However, such clauses may be less or more widely drawn, as a comparison of clause 49 ('unless such . . . arrest is occasioned by any personal act or omission or default of the Charterers or their agents') with, for example, the much more extensive provision under consideration in *The Doric Pride*⁶⁶ ('unless such . . . arrest is occasioned by any personal act or omission or default of the Charterers or their agents or by reason of cargo carried or calling port of trading [sic] under this charter') demonstrates. There are other variants of proviso which seek to tackle the matter in a different way, by simply addressing the identity of the defendant to the arrest (e.g. 'unless such arrest is due to action against Charterers or sub-Charterers or their Agents or the Contractors or the Cargo Shippers or Consignees').⁶⁷

64 See e.g. *The Captain Stefanos* [2012] 2 Lloyd's Rep 46.

65 See e.g. *The Nour* [1999] 1 Lloyd's Rep 1.

66 *Supra*.

67 As cited by NYK in the hearings below.

CHAPTER 5

Consignees' rights under the Rotterdam Rules

*Professor Michael F. Sturley**

5.1 Introduction

In this chapter, I will address a very specific topic – consignees' rights under the Rotterdam Rules.¹ Thus I will not discuss a consignee's duties or liabilities and I will minimize any discussion of a consignee's rights under legal regimes other than the Rotterdam Rules. To help balance the apparent narrowing of my topic, however, I will adopt a broad understanding of the term "rights." Over a century ago, Professor Hohfeld taught us that lawyers, judges, and academics often use the term "rights" to include things that should better be described as "privileges," "powers," or "immunities."² Despite Professor Hohfeld's argument for more precise definitions, I will follow the usage that he criticized (which remains common in current practice) and discuss consignees' "rights" under the Rotterdam Rules that may not satisfy the strict Hohfeldian definition of the term.

It is important to clarify another matter of terminology from the start. The Rotterdam Rules define the "consignee" as "a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record."³ I intend to adhere to that definition. But the reader should recognize that the consignee at any particular time during the course of a transaction is not necessarily the person that will actually take delivery of the goods (or even the

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1 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008, General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 [hereinafter Rotterdam Rules]. Minor amendments were adopted in January 2013 to correct two editorial mistakes. See Correction to the Original Text of the Convention, U.N. Doc. C.N.105.2013.TREATIES-XI-D-8 (Depositary Notification) (Jan. 25, 2013). Those two amendments have no bearing on the issues discussed here.

2 See W.N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", 23 (1913) YALE L.J. 16, at p. 30.

3 Rotterdam Rules art. 1(11). The terms "transport document" and "electronic transport record" are discussed *infra* notes 8–9 and accompanying text.

person that is expected to take delivery). In some commodity trades, goods may be sold dozens of times between their shipment and their eventual delivery. If each sale is accomplished by the transfer of a negotiable transport document with the transferee becoming the “holder” of that document,⁴ then there will be dozens of “consignees” during the course of the voyage. Each holder – while it is the holder – “is entitled to claim delivery of the goods from the carrier,”⁵ and is accordingly the “consignee” (until it negotiates the transport document to a subsequent buyer that becomes the new holder). Because the status of consignee is often so fleeting, I shall at times refer to the “ultimate consignee”⁶ to distinguish the person that actually takes delivery of the goods – or at least that intends to take delivery of the goods, since the rights under discussion are generally important during the time before delivery actually takes place – from those intermediate consignees whose status is merely temporary.

Even if “rights” and “consignees” are expansive terms, at first glance it may nevertheless seem that there is very little for me to say on the present subject. The Rotterdam Rules do not grant many rights to consignees as such. A consignee’s principal right – the right to take delivery of the goods⁷ – is admittedly of fundamental importance, but there is a limit to what needs to be said about it. To provide a more complete picture, it is important to recognize that a consignee will commonly qualify as the “holder” of the governing transport document⁸ or electronic transport record,⁹ and will often qualify as the “controlling party.” Discussing the rights that consignees will frequently exercise as holders¹⁰ and controlling parties¹¹ will therefore give a better idea of the rights that consignees in practice exercise under the Rotterdam Rules.¹²

5.2 Background

The first international convention governing the carriage of goods by sea, popularly known as the Hague Rules,¹³ was signed over 90 years ago, but its principles had previously been enacted as domestic legislation in the United States’ 1893 Harter

4 This is an example of a classic documentary sales transaction in which the buyer acquires title to the goods by acquiring the document of title that represents the goods.

5 Rotterdam Rules art. 47(1)(a).

6 See, e.g., *infra* text at notes 107, 110, 113, 120.

7 See *infra* notes 39–45 and accompanying text.

8 The Rotterdam Rules do not use the term “bill of lading” (except to the extent that it appears in the titles of prior conventions, see art. 89(1)). Paper bills of lading are instead included in the broader term “transport document.” See art. 1(14)–(16). See generally, e.g., M. F. Sturley, T. Fujita and G. van der Ziel, *The Rotterdam Rules: The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (2010, Sweet & Maxwell), ¶¶ 7.003–7.014.

9 Under the Rotterdam Rules, an “electronic transport record” is the electronic equivalent of a transport document. See art. 1(18)–(20); see also *supra* note 8.

10 See *infra* notes 80–87 and accompanying text.

11 See *infra* notes 88–130 and accompanying text.

12 Consignees already exercise rights under the Rotterdam Rules – even though the convention has not yet entered into force – because at least one important standard-form charterparty incorporates the Rotterdam Rules as a matter of contract. See ExxonMobil VOY2012 clause 27(b)(i) (the clause paramount of ExxonMobil’s Tanker Voyage Charter Party).

13 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 [hereinafter Hague Rules].

Act¹⁴ and Harter-inspired domestic legislation in other countries.¹⁵ Following the central compromise first adopted in 1893 and carried forward to the present day, the Hague Rules allocate responsibility for cargo loss or damage between the carrier and cargo interests. The carrier is required to exercise due diligence to furnish a seaworthy vessel,¹⁶ and is liable for negligence in the care and custody of the cargo.¹⁷ But the carrier is excused from liability for loss or damage due to a number of enumerated perils,¹⁸ including negligence in the navigation or management of the ship.¹⁹ When the carrier is liable, it may limit its liability to a specified amount per package or unit.²⁰

A 1968 protocol amended the Hague Rules to produce the Hague-Visby Rules,²¹ but the fundamental structure remained the same. The protocol simply revised a handful of provisions that were considered problematic. The most notable change was to increase the package limitation amount and add an alternative weight-based limitation amount.²² The protocol was widely adopted, and the Hague-Visby Rules are now the most popular regime to address liability for cargo loss or damage during international ocean shipments.

Ten years after the Visby Protocol, the United Nations adopted a new convention, popularly known as the Hamburg Rules,²³ which was intended to supersede the Hague and Hague-Visby Rules. The Hamburg Rules are widely perceived as being more generous to cargo interests than the Hague or Hague-Visby Rules. For example, the carrier can no longer escape liability based on the crew's negligence in the navigation or management of the ship.²⁴ But it is remarkable how similar the Hamburg Rules are to the prior regimes. All three allocate the risk of cargo loss or damage between the carrier and cargo interests on the basis of the carrier's presumed fault with a reversed burden of proof, meaning that the carrier is presumptively liable for any loss or damage unless it can establish a defense. All three regimes permit the carrier to limit its liability at specified levels.

The Rotterdam Rules are designed to supersede the Hague, Hague-Visby, and Hamburg Rules. The new convention continues to govern carriers' liability for

14 27 Stat. 445 (1893). The Harter Act was recodified in 2006, and the current version is now found at 46 U.S.C. §§ 30701–07.

15 See generally, e.g., M. F. Sturley, "The History of COGSA and the Hague Rules", 22 (1991) J. MAR. L. & COM. 1, at pp. 15–17.

16 See Hague Rules arts. 3(1), 4(1).

17 See Hague Rules art. 3(2).

18 See Hague Rules art. 4(2).

19 See Hague Rules art. 4(2)(a).

20 See Hague Rules art. 4(5).

21 The Hague-Visby Rules are the Hague Rules, *supra* note 13, as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), Feb. 23, 1968, 1412 U.N.T.S. 128 [hereinafter Visby Protocol], and also (perhaps) the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1412 U.N.T.S. 146.

22 See Hague-Visby Rules art. 4(5)(a).

23 United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules].

24 Cf. *supra* note 19 and accompanying text.

cargo loss or damage, building on the experience of the prior regimes.²⁵ But – in an effort to modernize the law governing the carriage of goods by sea – it addresses a much broader range of issues than have previous maritime conventions.²⁶ For example, the Rotterdam Rules seek to facilitate electronic commerce in the shipping industry, a concept that was not even imagined when the Hamburg Rules were negotiated.²⁷ Similarly, the Rotterdam Rules provide the first systematic response to the so-called container revolution,²⁸ which has completely changed international shipping over the last 50 years.²⁹ In other words, the Rotterdam Rules are much more than a liability convention. When examining consignees' rights under the Rotterdam Rules, it is accordingly appropriate to consider more than the liability aspects of the subject.

5.3 The rights of consignees as “consignees”

The Rotterdam Rules mention the “consignee” in 32 separate provisions,³⁰ but very few of those provisions confer any rights on a consignee. Most are essentially definitional. In this category, I include not only the five relevant provisions in article 1,³¹ which defines most of the terms used in the convention, but also other provisions in which the term “consignee” is used to define or identify something independent of a consignee's rights or duties. Article 12(2)(b), for example, refers to the consignee when defining the end of the carrier's period of responsibility in a particular context,³² but the provision itself gives the consignee no rights (however broadly defined) and imposes no duties³³ (however broadly defined) on the consignee. Similarly, article 31(1) obligates the shipper to provide “the name of the consignee, if any” to the carrier. Although the consignee is mentioned, the duty is the shipper's and the correlative right is the carrier's.

²⁵ See Rotterdam Rules chs. 5, 6, 7 and 12.

²⁶ See Rotterdam Rules chs. 3, 9, 10 and 11.

²⁷ See, e.g., Rotterdam Rules ch. 3 (arts. 8–10).

²⁸ See, e.g., M. Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*, (2008, Princeton University Press); B.J. Cudahy, *Box Boats: How Container Ships Changed the World*, (2008, Fordham University Press).

²⁹ The Hague-Visby and Hamburg Rules each address containerization in a single provision that addresses only the calculation of the package limitation. See Hague-Visby Rules art. 4(5)(c); Hamburg Rules art. 6(2)(a). Substantially the same provision is included in the Rotterdam Rules, see art. 59(2), but other provisions also address the problems of containerization.

³⁰ See Rotterdam Rules arts. 1(6)(b), 1(10)(a), 1(11), 1(15), 1(19)(a), 5(2), 7, 11, 12(2)(b), 13(2), 17(3)(i), 31(1), 36(3)(a), 41(b)(ii), 41(c), 42, 43, 44, 45(a), 45(b), 45(c), 46(a), 46(b), 48(1)(a), 48(1)(d), 48(2), 48(3), 50(1)(c), 51(1)(a), 51(2)(a), 79(2)(a), 79(2)(b).

³¹ See Rotterdam Rules arts. 1(6)(b), 1(10)(a), 1(11), 1(15), 1(19)(a).

³² Article 12(2)(b) provides:

If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

³³ Just as I use the term “rights” very broadly to include “privileges,” “powers,” and “immunities,” see *supra* note 2 and accompanying text. I similarly use the term “duties” very broadly to include Hohfeldian “no-rights,” “liabilities,” and “disabilities.” Cf. Hohfeld, *supra* note 2, at 30.

A few provisions impose duties on the consignee. Most significantly, article 43 imposes the obligation (in certain circumstances) to accept delivery of the goods,³⁴ and the closely related article 44 imposes the obligation to acknowledge receipt of the goods.³⁵ But the provisions imposing obligations on the consignee are beyond the scope of the present paper, and I will not discuss them further.

Only a few provisions grant rights to the consignee as such. The most important is the right to take delivery of the goods.³⁶ Closely related to the delivery right is the right to rely on the contract particulars.³⁷ And article 79 in essence gives the consignee (among others) the right to rely on the Rotterdam Rules.³⁸

5.3.1 *The right to take delivery of the goods*

From the perspective of the cargo interests, the entire point of the contract of carriage is to enable the consignee to take delivery of the goods.³⁹ Indeed, the right to take delivery of the goods is built into the Rotterdam Rules' definition of "consignee" as "a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record."⁴⁰ The substantive provisions of the convention establish the consignee's right to delivery in article 11, which imposes the correlative duty on the carrier to "deliver [the goods] to the consignee."⁴¹ A few provisions in chapter 9 of the Rotterdam Rules, which covers "delivery of the goods," flesh out some more details of the consignee's right to take delivery. For example, articles 45(a) and 46(a) say when and where the consignee is entitled to delivery, and specify some of the conditions on the assertion of that right.⁴²

34 Article 43 provides:

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

35 Article 44 provides:

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

36 See *infra* notes 39–45 and accompanying text.

37 See *infra* notes 46–68 and accompanying text.

38 See *infra* notes 69–79 and accompanying text.

39 From the perspective of the carrier, perhaps the entire point of the contract of carriage is to collect the freight. But even the carrier must recognize that its primary obligation is to "carry the goods to the place of destination and deliver them to the consignee." Rotterdam Rules art. 11.

40 Rotterdam Rules art. 1(11).

41 Article 11 provides:

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

42 Article 45(a) applies when no negotiable transport document or negotiable electronic transport record has been issued. Article 46(a) applies when a so-called recta bill of lading has been issued. See *infra* note 52. Article 47 provides comparable rules when a negotiable transport document or negotiable electronic transport record has been issued, but in that case the "holder" is entitled to delivery, see art.

In view of the fundamental nature of the carrier's obligation to deliver the goods and the consignee's right to take delivery of the goods, it is perhaps surprising that prior conventions in the field do not address the subject. The Hague and Hague-Visby Rules, for example, mention delivery only as the starting point of the notice-of-claim and time-for-suit periods.⁴³ National law currently fills the gap in developed legal systems,⁴⁴ but the omission nevertheless creates problems. If the carrier's obligation to deliver the goods arises only under national law, then a simple misdelivery is arguably not a breach of the carrier's obligations under the convention – with the result that the carrier may not be entitled to limit liability under the convention. Different countries have adopted different approaches, and uniformity has accordingly suffered. By giving the consignee a clear right to delivery, and imposing the correlative duty to deliver the goods on the carrier, the Rotterdam Rules address the prior uncertainty.⁴⁵ Under the new convention, misdelivery is explicitly a breach of the convention, and the convention addresses the consequences of that breach.

5.3.2 *The right to rely on the contract particulars*

In a classic documentary sales transaction,⁴⁶ the consignee pays for the goods sight unseen – relying on the description of the goods in the transport document. The Rotterdam Rules, building on (and extending) the example of prior maritime conventions,⁴⁷ give the consignee the right to rely not only on the description of the goods but also on other contract particulars.⁴⁸

The extent to which a consignee can rely on the description of the goods in the contract particulars depends on the circumstances of the transaction.⁴⁹ When a negotiable transport document or negotiable electronic transport record is transferred to a consignee (or any other third party) acting in good faith – whether or not the transferee qualifies as a holder⁵⁰ – the carrier is bound by “any contract

47(1)(a), and thus qualifies as the “consignee” under the article 1(11) definition. *See infra* notes 80–83 and accompanying text.

43 Hague Rules art. 3(6). The Visby Protocol did not amend this provision, and thus it remains the same in the Hague-Visby Rules.

44 *See, e.g., Sze Hai Tong Bank Ltd. v Rambler Cycle Co.*, [1959] A.C. 576 (P.C. Sing.) (holding that a carrier that fails to deliver the goods to the person entitled under the bill of lading is in breach of the contract of carriage and also liable for conversion); *see also, e.g., id.* at 587 (describing “proper delivery of the goods” as “the main object and intent of the contract,” “one of [the contract’s] main objects,” and “one of the prime obligations of the contract”).

45 *See, e.g., Sturley, Fujita and van der Ziel, supra* note 8, ¶¶ 8.001–8.002.

46 *Cf. supra* note 4 and accompanying text.

47 *See, e.g.,* Hague-Visby Rules art. 3(4); Hamburg Rules art. 16(3).

48 The Rotterdam Rules define “contract particulars” as “any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.” Art. 1(23).

49 The consignee’s rights also depend on how the goods are described in the contract particulars. Article 40 permits some descriptions to be qualified in certain circumstances.

50 As a practical matter, negotiable transport documents have almost inevitably been transferred by negotiation, with the result that the transferee qualifies as a holder. In that case, the transferee also becomes the consignee. *See infra* notes 80–82 and accompanying text. At least in theory, a transport document may be transferred by assignment rather than being negotiated, and the transferee will not

particulars.”⁵¹ So-called recta bills of lading⁵² are subject to substantially the same rule, except that the document must be transferred to the consignee acting in good faith.⁵³

For non-negotiable transport documents and non-negotiable electronic transport records, the consignee's rights are more limited. The document or record is still “prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars,”⁵⁴ but the carrier may seek to disprove those statements in some circumstances. For example, the carrier may generally offer evidence to contradict information about the goods that was furnished by the shipper (unless the carrier was independently required to verify that information). But a consignee who in good faith acted in reliance⁵⁵ on the relevant contract particulars has the right to rely – notwithstanding any contrary proof that might otherwise be available to the carrier – on:

- (1) “A description of the goods as appropriate for the transport,”⁵⁶ when that information is furnished by the carrier;
- (2) “The leading marks necessary for identification of the goods,”⁵⁷ when that information is furnished by the carrier;
- (3) “The number of packages or pieces, or the quantity of goods,”⁵⁸ when that information is furnished by the carrier;
- (4) “The weight of the goods,”⁵⁹ when that information is furnished by the carrier;
- (5) “The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals”;⁶⁰

be a “holder.” For example, a holder could deliver physical possession of a transport document to a lender without indorsement. The lender would not become the holder, and thus would lack the power to demand delivery or to negotiate the document to a third party. But the lender would have the power to prevent its borrower from exercising any rights (until the borrower repaid the loan and recovered the document), and in some circumstances the lender might consider that to be adequate security for the loan.

51 See Rotterdam Rules art. 41(b)(i).

52 The Rotterdam Rules do not use the term “recta bill of lading,” which is unfamiliar in many legal systems. Article 46 instead uses the somewhat unwieldy phrase “a non-negotiable transport document . . . that indicates that it shall be surrendered in order to obtain delivery of the goods.” See generally Sturley, Fujita and van der Ziel, *supra* note 8, ¶¶ 7.013, 8.038.

53 See Rotterdam Rules art. 41(b)(ii).

54 Rotterdam Rules art. 41(a).

55 During the negotiations, some delegates questioned whether a consignee could ever rely on the description of the goods in a non-negotiable transport document. See, e.g., *Report of Working Group III (Transport Law) on the Work of its Eighteenth Session* ¶ 53, U.N. doc. no. A/CN.9/616 (2006). One straightforward example of such reliance would be in a transaction in which the consignee arranged a letter of credit authorizing payment when the shipper presented a non-negotiable transport document to prove that the goods had in fact been shipped to the consignee in apparent good order and condition. See, e.g., *Report of Working Group III (Transport Law) on the Work of its Eleventh Session* ¶ 46, U.N. doc. no. A/CN.9/526 (2003) [hereinafter *Eleventh Session Report*].

56 Rotterdam Rules art. 36(1)(a) (one of the items specified in art. 41(c)(i)).

57 Rotterdam Rules art. 36(1)(b) (one of the items specified in art. 41(c)(i)).

58 Rotterdam Rules art. 36(1)(c) (one of the items specified in art. 41(c)(i)).

59 Rotterdam Rules art. 36(1)(d) (one of the items specified in art. 41(c)(i)).

60 Rotterdam Rules art. 41(c)(ii).

- (6) “A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage”;⁶¹
- (7) “The name and address of the carrier”;⁶² and
- (8) “The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued.”⁶³

This leaves the carrier free to dispute any of the first four items to the extent that the information was furnished by the shipper,⁶⁴ the identifying numbers of the container seals,⁶⁵ the place of the carrier’s receipt of the goods,⁶⁶ and any other information about the goods in the contract particulars that is not included on the list.

Article 42 also gives consignees the explicit right to rely on a particular type of statement in the contract particulars. It is common in practice to see a notation in a transport document to the effect that the freight has been prepaid. On its face, that appears to be simply a factual assertion, but such statements are used in practice not only when the shipper has indeed paid the freight in advance but also when the carrier has agreed that it will rely only on the shipper for the payment of the freight. Under article 42, a consignee has the right to rely on “the statement ‘freight prepaid’ or a statement of a similar nature.”⁶⁷ Even if the shipper has defaulted on the obligation to pay freight, “the carrier cannot assert against . . . the consignee the fact that the freight has not been paid” unless “the consignee is also the shipper.”⁶⁸

5.3.3 *The right to rely on the Rotterdam Rules*

One often hears the argument that the mandatory nature of the Hague,⁶⁹ Hague-Visby,⁷⁰ and Hamburg Rules⁷¹ was intended to protect shippers with limited bargaining power from more powerful carriers that would otherwise deny them their rights through boilerplate provisions in contracts of carriage or transport documents.⁷² It is more likely that the original purpose was not to protect shippers but

61 Rotterdam Rules art. 36(2)(a) (one of the items specified in art. 41(c)(iii)).

62 Rotterdam Rules art. 36(2)(b) (one of the items specified in art. 41(c)(iii)).

63 Rotterdam Rules art. 36(2)(c) (one of the items specified in art. 41(c)(iii)).

64 See Rotterdam Rules art. 41(c)(i).

65 See Rotterdam Rules art. 41(c)(ii).

66 See Rotterdam Rules art. 36(3)(c).

67 “Freight paid in advance” is an example of “a statement of a similar nature.” See *Report of Working Group III (Transport Law) on the Work of its Twenty-First Session* ¶ 143, U.N. doc. no. A/CN.9/645 (2008).

68 Article 42 provides:

If the contract particulars contain the statement “freight prepaid” or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

69 See Hague Rules art. 3(8).

70 See Hague-Visby Rules art. 3(8). The Visby Protocol did not amend article 3(8) of the Hague Rules, and thus the provisions are identical in the two regimes.

71 See Hamburg Rules art. 23(1).

72 See, e.g., *Eleventh Session Report*, *supra* note 55, ¶ 205; *Report of Working Group III (Transport Law) on the Work of its Fifteenth Session* ¶ 46, U.N. doc. no. A/CN.9/576 (2005).

rather to protect third parties (such as consignees) who had not had the opportunity to negotiate with the carrier, and who would purchase rights represented by transport documents without a realistic opportunity to examine the boilerplate provisions.⁷³

The Rotterdam Rules largely continue the “one-way mandatory” protection of the earlier maritime conventions,⁷⁴ and go further to emphasize that third parties – explicitly including consignees – are protected. Under article 79(1), a carrier may not directly or indirectly exclude or limit any of its obligations to the consignee (or other cargo interests), and may not directly or indirectly exclude or limit its liability for the breach of any obligation under the convention.⁷⁵ Thus the consignee can rely, for example, on its right to take delivery of the goods,⁷⁶ confident that the carrier cannot insert a provision in the boilerplate terms of the contract of carriage that would exclude or limit its obligation to deliver the goods to the consignee, or limit its liability for failing to deliver the goods.

Article 79(2) is to some extent the mirror image of article 79(1). Among other things, it precludes the possibility that a contractual provision will directly or indirectly increase any obligation of the consignee, or increase the consignee’s liability for the breach of any obligation under the convention.⁷⁷ The consignee’s obligations and liabilities under the Rotterdam Rules are beyond the scope of this paper,⁷⁸ and thus I will not discuss them here. But article 79(1) gives the consignee the right to rely on the convention’s definition of those obligations and liabilities,

73 See M. F. Sturley, “The Mandatory Character of the Convention and Its Exceptions: Volume Contracts,” in *Las Reglas de Rotterdam: Una Nueva Era En El Derecho Uniforme Del Transporte- Actas Del Congreso Internacional [The Rotterdam Rules: A New Era in Uniform Transport Law- Proceedings of the International Congress]* 271, at pp. 289–290 (Rafael Illescas Ortiz & Manuel Alba Fernández eds. 2012) [hereinafter *Mandatory Character*].

74 Article 79(2) introduces some aspects of a “two-way mandatory” system by prohibiting any reduction in the cargo interests’ obligations. Article 80 also provides for greater freedom of contract in certain narrowly defined circumstances. See generally, e.g., Sturley, *Mandatory Character*, *supra* note 73.

75 Article 79(1) provides:

Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

- (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;
- (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or
- (c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

76 See *supra* notes 39–45 and accompanying text.

77 Article 79(2) provides:

Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

- (a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or
- (b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

78 See *supra* text following note 1.

confident that the carrier cannot insert a provision in the boilerplate terms of the contract of carriage that would impose greater obligations and liabilities.

In sum, article 79 guarantees the consignee the right to rely on the Rotterdam Rules to define its relationship with the carrier on all matters that are within the scope of the convention.⁷⁹ It will not be bound by boilerplate terms that it did not negotiate and that it had no realistic opportunity to examine before acquiring an interest in the transaction.

5.4 The rights of consignees as “holders”

In the classic situation when a negotiable transport document or negotiable electronic transport record governs the transaction, the current consignee⁸⁰ will be a holder of the transport document or electronic transport record. This conclusion follows directly from the definitions and other basic principles. The holder of a negotiable transport document or negotiable electronic transport record “is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination.”⁸¹ Because the person “entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record” is by definition the “consignee,”⁸² a holder is a consignee, and vice versa, when a negotiable transport document or negotiable electronic transport record governs the transaction.

Most of a holder’s rights correspond to a consignee’s rights, including the right to take delivery of the goods,⁸³ the right to rely on the contract particulars,⁸⁴ and the right to rely on the Rotterdam Rules.⁸⁵ In addition, a holder has the right to transfer all of the rights incorporated in the document or record – not just the rights explicitly granted to holders – by transferring the document or record to another person.⁸⁶ In other words, when a “holder” acquires that status because a

79 It is important to recall that the Rotterdam Rules do not govern every aspect of the relationship between the consignee and the carrier. The consignee may be subject to boilerplate terms regarding the payment of freight, for example, because that is a subject that the convention does not address. See, e.g., *Report of Working Group III (Transport Law) on the Work of its Thirteenth Session ¶¶ 162–164*, U.N. doc. no. A/CN.9/552 (2004) (reporting the discussion during which the Working Group decided to omit a chapter on freight).

80 See *supra* text at notes 5–6.

81 Rotterdam Rules art. 47(1)(a).

82 Rotterdam Rules art. 1(11).

83 See Rotterdam Rules art. 47(1)(a); cf. *supra* notes 39–45 and accompanying text.

84 See Rotterdam Rules arts. 41(b)(1), 42; cf. *supra* notes 46–68 and accompanying text.

85 See Rotterdam Rules art. 79; cf. *supra* notes 69–79 and accompanying text.

86 See Rotterdam Rules art. 57. Article 57 provides:

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:
 - (a) Duly endorsed either to such other person or in blank, if an order document; or
 - (b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.
2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

prior holder negotiated the document or transferred the record to it, the Rotterdam Rules grant the subsequent holder *all* of the rights incorporated in the document or record.⁸⁷

5.5 The rights of consignees as “controlling parties”

In contrast with prior maritime conventions,⁸⁸ the Rotterdam Rules include an entire chapter governing the “rights of the controlling party.”⁸⁹ In essence, the controlling party is the person that has the right to give instructions to or otherwise deal with the carrier. The concept is important because the Rotterdam Rules, in contrast to prior maritime conventions, are intended to serve as much more than a liability convention.⁹⁰

5.5.1 *Becoming the controlling party*

Although the consignee is not necessarily the controlling party, in typical transactions the consignee will often become the controlling party under article 51 of the convention. When a negotiable transport document or negotiable electronic transport record governs the transaction, the holder will generally⁹¹ be the controlling party.⁹² Because consignees are frequently holders, as discussed in the previous section,⁹³ they will frequently be controlling parties. Under a so-called recta bill of lading,⁹⁴ the consignee becomes the controlling party when it takes possession of the document.⁹⁵ In other cases, including shipments governed by a traditional non-negotiable transport document (such as a seawaybill), the consignee may be

87 It seems implicit in the Rotterdam Rules that the original holder also has all of the rights incorporated in the document or record, but the convention itself does not grant those rights to the original holder. As a practical matter, the omission makes little, if any, difference. The original holder will typically be the shipper, which already has all of the rights incorporated in the document or record because it is the party that contracted with the carrier; whatever rights are incorporated in the document or record arose out of that contract. In any event, most (if not all) legal systems recognize that the holder of a negotiable transport document has all of the rights incorporated in the document, and thus the original holder will have those rights under applicable law even if the Rotterdam Rules do not provide them.

88 Although the Hague, Hague-Visby, and Hamburg Rules do not address controlling parties, conventions governing other modes of transportation have long addressed the subject. *See, e.g.*, Montreal Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, art. 12, 2242 U.N.T.S. 350, 353–354; Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, arts. 12, 14–16, 399 U.N.T.S. 189, 200, 202–204.

89 Rotterdam Rules ch. 10 (arts. 50–56). For a more detailed discussion of the Rotterdam Rules’ treatment of controlling parties, see Sturley, Fujita and van der Ziel, *supra* note 8, ¶¶ 9.001–9.058.

90 *See infra* notes 121–130 and accompanying text.

91 If the carrier has issued more than one original negotiable transport document, art. 51(3)(a) grants controlling-party status only to a person that holds all of the originals.

92 *See* Rotterdam Rules art. 51(3)–(4).

93 *See supra* notes 80–82 and accompanying text.

94 *See supra* note 52.

95 *See* Rotterdam Rules art. 51(2).

designated as the controlling party when the contract of carriage is concluded,⁹⁶ or the right of control may thereafter be transferred to the consignee.⁹⁷

5.5.2 *The consignee's rights as controlling party*

A consignee that becomes the controlling party explicitly acquires five additional⁹⁸ rights under the Rotterdam Rules. First, it can “give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage.”⁹⁹ This provision contemplates the type of instructions that are necessary to complete the contract of carriage, such as instructions specifying the temperature at which refrigerated goods should be carried, or instructions on when or how the goods should be delivered.¹⁰⁰ In recognition of the controlling party's right to give instructions, the Rotterdam Rules explicitly require the carrier to ask for its instructions on certain matters.¹⁰¹

Second, the consignee as controlling party can “obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route.”¹⁰² Because the contract of carriage generally identifies the place of delivery, obtaining delivery en route usually involves a variation to the contract of carriage. Sometimes that will not be a problem for the carrier. But sometimes it will be impossible for the carrier to deliver the goods en route, or it will be possible only if the carrier incurs additional costs. Thus the carrier is not required to follow the controlling party's instructions if they cannot “reasonably be executed according to their terms at the moment that they reach the carrier,”¹⁰³ if they would “interfere with the normal operations of the carrier, including its delivery practices,”¹⁰⁴ or if the controlling party fails to provide “security . . . for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with [their] execution.”¹⁰⁵

The right to obtain delivery en route tends to be most valuable in practice when the controlling party wishes to ensure that the goods do not reach the consignee (which means that the controlling party and the consignee would be different persons).

⁹⁶ See Rotterdam Rules art. 51(1)(a).

⁹⁷ See Rotterdam Rules art. 51(1)(b).

⁹⁸ A controlling party as “controlling party” generally has the same three rights as a consignee. The right to take delivery of the goods, *see supra* notes 39–45 and accompanying text, is implicit in the controlling party's right under article 50(1)(b) to “obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route.” *See infra* notes 102–105 and accompanying text. The right to rely on the contract particulars, *see supra* notes 46–68 and accompanying text, extends to any third party to whom a negotiable transport document or negotiable electronic transport record has been transferred in good faith, *see* art. 41(b)(i), and that is the context in which there is most likely to be a controlling party other than the consignee. Finally, the right to rely on the Rotterdam Rules, *see supra* notes 69–79 and accompanying text, explicitly applies to controlling parties. *See* art. 79(2).

⁹⁹ Rotterdam Rules art. 50(1)(a).

¹⁰⁰ *See, e.g., Eleventh Session Report, supra* note 55, ¶ 102.

¹⁰¹ *See, e.g.,* Rotterdam Rules art. 45(c).

¹⁰² Rotterdam Rules art. 50(1)(b).

¹⁰³ Rotterdam Rules art. 52(1)(b).

¹⁰⁴ Rotterdam Rules art. 52(1)(c).

¹⁰⁵ Rotterdam Rules art. 52(3).

For example, an unpaid seller that retains the right of control may wish to ensure that the goods do not arrive in an insolvent consignee's jurisdiction where the consignee's receiver could take control of them.¹⁰⁶ These considerations have little relevance when the controlling party is the consignee, and no relevance when the controlling party is the ultimate consignee.¹⁰⁷ But even an ultimate consignee may wish to obtain delivery en route when plans change. For example, a consignee who originally intends to use the goods in one location may wish to divert them to a different location if market conditions change, or if the political situation becomes unstable in the original destination.

Third, the consignee as controlling party can name "any other person" to take its place as the consignee.¹⁰⁸ Depending on the circumstances, exercising this right may also involve a variation to the contract of carriage. Once again, the carrier need not follow instructions when it would be unreasonable to do so.¹⁰⁹ Replacing the consignee may be important when an unpaid seller that retains the right of control wishes to reclaim the goods, or to sell them to a different buyer – a concern that is irrelevant when the controlling party is the ultimate consignee.¹¹⁰ But it can also be important when a consignee simply wishes to resell goods in transit.

Fourth,¹¹¹ the consignee as controlling party may transfer the right of control to another person, thus making the transferee the new controlling party.¹¹² A consignee would typically transfer the right of control in conjunction with a sale of the goods, under which the transferee would become the new consignee (as well as the new controlling party), but this is not necessarily so. For example, a consignee pledging the goods may transfer the right of control to the lender to protect the lender's security interest in the goods. Thus the power to transfer the right of control may be valuable even for an ultimate consignee that still intends to take actual delivery of the goods.¹¹³

Fifth,¹¹⁴ the consignee as controlling party "may agree with the carrier to [other] variations to the contract of carriage."¹¹⁵ In other words, the controlling party essentially steps into the shipper's shoes as the carrier's contractual counterpart, at least prospectively. The controlling party and the carrier can accordingly agree

106 See, e.g., *Report of Working Group III (Transport Law) on the Work of its Seventeenth Session* ¶ 14, U.N. doc. no. A/CN.9/594 (2006); Sturley, Fujita and van der Ziel, *supra* note 8, ¶ 9.012.

107 See *supra* text at note 6.

108 Rotterdam Rules art. 50(1)(c).

109 See *supra* notes 103–105 and accompanying text.

110 See *supra* text at note 6.

111 Although article 50(1) declares that "[t]he right of control . . . is limited to" the three rights specified in article 50(1)(a)–(c) – *i.e.*, giving instructions, obtaining delivery en route, or specifying a new consignee – article 51 explicitly grants the controlling party the additional right to transfer the right of control. The transfer right goes beyond the "right of control" as that term is defined in article 1(12).

112 See Rotterdam Rules art. 51(1)(b), 51(3)(b), 51(4)(b).

113 See *supra* text at note 6.

114 Although art. 50(1) limits the right of control to three specified rights, art. 54(1) explicitly grants the controlling party this additional right, which once again goes beyond the "right of control" (as that term is defined in art. 1(12)). Cf. *supra* note 111.

115 Rotterdam Rules art. 54(1). Contract variations under art. 54(1) are "other" than the contract variations covered by art. 50(1)(b)–(c), *i.e.*, obtaining delivery en route or specifying a new consignee.

on any modification of the contract of carriage that both of them find acceptable.¹¹⁶

The Rotterdam Rules implicitly give the consignee as controlling party a sixth right, which may be more important than the five explicit rights. The convention is explicit that “[t]he right of control may be exercised *only* by the controlling party,”¹¹⁷ and “[t]he controlling party is the *only* person that may agree with the carrier to [other] variations to the contract of carriage.”¹¹⁸ When the consignee is the controlling party, therefore, it is protected from the risk that another person will exercise any of the controlling party’s rights. In other words, no other person can (1) give the carrier instructions, which might be inconsistent with the consignee’s instructions; (2) obtain delivery of the goods before the carrier delivers them to the consignee; (3) specify a new consignee, which would deprive the consignee of its rights; or (4) agree with the carrier to vary the contract in some other way, possibly to the consignee’s detriment. Because the right of control is often important in practice to protect a party with an interest in the goods from the risk that the consignee will not pay for them,¹¹⁹ some of the controlling party’s explicit rights are somewhat less important to the consignee (and particularly to the ultimate consignee¹²⁰). But the implicit right of the consignee as controlling party to be free from someone else’s exercise of those explicit rights will always be important.

5.5.3 *The importance of recognizing the consignee’s rights as controlling party*

The consignee’s rights as “controlling party,” when the consignee qualifies as the controlling party, are important in part because they are the broadest rights that the consignee is likely to have.¹²¹ But it is also important to understand the consignee’s rights as controlling party because those rights go to the very heart of the Rotterdam Rules. Whereas the Hague, Hague-Visby, and Hamburg Rules are primarily liability conventions,¹²² the Rotterdam Rules are much broader.¹²³

One of the Rotterdam Rules’ principal goals, as part of the effort to modernize shipping law, is to facilitate the use of electronic commerce. The biggest obstacle to that modernization has been the antiquated legal system. The business community is understandably unwilling to shift from paper documents to electronic transport records without knowing that the legal system will give effect to those records in the manner intended by the parties. Although the technology already exists for an electronic transport record to do what a paper bill of lading currently

116 See generally, e.g., Sturley, Fujita and van der Ziel, *supra* note 8, ¶¶ 9.044–9.048.

117 Rotterdam Rules art. 50(1) (emphasis added).

118 Rotterdam Rules art. 54(1) (emphasis added). See *supra* note 115.

119 See *supra* notes 106–107, 110 and accompanying text.

120 See *supra* text at note 6.

121 A controlling party generally has the same rights as a consignee, see *supra* note 98, and also has the six additional rights discussed in this section, see *supra* notes 99–120.

122 See *supra* notes 16–24 and accompanying text.

123 See *supra* notes 26–29 and accompanying text.

does, we must agree on exactly what a paper bill of lading does and the extent to which an electronic equivalent should do the same thing. National laws currently govern almost every aspect of the subject, and they vary in their treatment of paper documents. Fundamental disagreements exist even between similar legal systems.¹²⁴

UNCITRAL, as part of its Electronic Data Interchange (EDI) project, recognized the problems arising from the disuniformity in the law governing shipping documents. In June 1996, UNCITRAL discussed a proposal to

review . . . current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved.¹²⁵

In conjunction with that discussion, it noted:

[E]xisting national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of the entities that provided financing to a party to the contract of carriage.¹²⁶

UNCITRAL accordingly authorized its Secretariat to gather information on those matters with a view to deciding “on the nature and scope of any future work that might usefully be undertaken by [UNCITRAL].”¹²⁷ The entire Rotterdam Rules project thus grew out of the desire to modernize the law governing shipping documents in order to facilitate electronic commerce – not from a desire to revise the liability rules established in the Hague, Hague-Visby, and Hamburg Rules. Moreover, the project proceeded in its initial stages without any consideration of liability issues.¹²⁸

UNCITRAL recognized that successful electronic transport records require “functional equivalence.” In other words, they must be able to fulfill the functions of traditional paper documents. Achieving functional equivalence accordingly requires an understanding of the core functions of traditional paper documents, at least in the carriage context. The convention itself must establish a party’s rights and responsibilities; a party’s status cannot depend on the possession of a paper document that will no longer exist.

124 To give just one very basic example, U.S. and English law do not fully agree on the meaning of the term “bill of lading,” despite the fact that U.S. commercial law is largely derived from English law. U.S. law generally recognizes a non-negotiable document such as a “seawaybill” as a type of bill of lading that need not be surrendered to obtain delivery of the goods. English law, by contrast, treats a “seawaybill” as something distinct from a “bill of lading.” Cf. *I MacWilliam Co. v. Mediterranean Shipping Co. (The Rafaela S)*, [2005] U.K.H.L. 11 (distinguishing a “straight bill of lading” from a “seawaybill” and treating a “straight bill of lading” as a “bill of lading or . . . similar document of title” for purposes of applying the Hague-Visby Rules).

125 *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Ninth Session*, U.N. GAOR, 51st Sess., Supp. No. 17, ¶ 210, U.N. Doc. A/51/17 (1996), reprinted in 1996 CMI YEARBOOK 354.

126 *Id.*

127 *Id.* ¶ 215, reprinted in 1996 CMI YEARBOOK 355.

128 See, e.g., S. N. Beare, *Issues of Transport Law: Introductory Paper*, 1999 CMI YEARBOOK 117.

An electronic transport record can easily serve as a receipt for the goods and as evidence of the contract of carriage. Those functions turn on the relationship between the shipper and the carrier – the two original parties to the contract. It was more difficult to establish functional equivalence for the “document of title” function. With a paper bill of lading, a holder can transfer rights in the goods to a third party outside of the original contractual relationship. That is a subject that goes well beyond transport law and the contract of carriage, raising issues (for example, of property law) that are outside the scope of the Rotterdam Rules. But it is reasonably clear that a traditional bill of lading’s function as a document of title (including the power that it gives a holder to transfer a property interest in the goods through a transfer of the paper document) can be traced to the right to control the goods that is embodied in the document. Because a traditional bill of lading empowers the holder to obtain delivery of the goods from the carrier, the ability to transfer the power to obtain delivery evolved into the ability to transfer property in the goods. By focusing on the basic principles, therefore, it was possible to achieve the necessary functional equivalence for electronic commerce.

Chapter 3 of the Rotterdam Rules is often cited as the “electronic commerce” portion of the new convention.¹²⁹ Although chapter 3 is undoubtedly important, several other provisions are also critical.¹³⁰ Ultimately, it is chapters 9 (articles 43–49), covering delivery of the goods; 10 (articles 50–56), defining the rights of the controlling party; and 11 (articles 57–58), addressing the transfer of rights, that will enable electronic transport records. By uniformly describing the rights and responsibilities that flow from paper documents or electronic transport records, those chapters establish the legal framework that will give industry the ability to rely on electronic transport records.

In sum, the focus on the consignee’s rights as a controlling party illustrates and explains the central aspect of the Rotterdam Rules’ effort to facilitate electronic commerce, which is one of the most important aspects of the Rotterdam Rules’ effort to modernize the international regime covering the carriage of goods by sea.

5.6 Conclusion

The Hague Rules were very deliberately intended to implement on an international basis the principles of the U.S. Harter Act of 1893. The Visby Amendments made only a handful of specific changes, and thus the Hague-Visby Rules – the predominate international regime today – remain primarily a codification of a late-nineteenth-century response to the problems that arose in the early years of the steam era. Even the Hamburg Rules did more to adjust the balance between shipper

¹²⁹ Chapter 3, titled “electronic transport records,” contains three articles. Article 8 authorizes the use of electronic transport records. Article 9 addresses the procedures governing electronic transport records. And article 10 governs conversions between electronic transport records and paper documents.

¹³⁰ See, e.g., art. 3 (second sentence) (generally permitting electronic communication whenever written confirmation would otherwise be required).

and carrier interests on liability issues than to modernize the basic regime. Modernization is long overdue. Modernizing the liability regime is one aspect of the task, but liability issues take center stage only in those rare cases when something goes horribly wrong and the cargo is lost or damaged. It is far more important to modernize those aspects of current law that are important in every transaction. Facilitating electronic commerce is a prime example of what needs to be done. And examining the details of the consignee's rights under the Rotterdam Rules, particularly the rights that a consignee will obtain when it qualifies as a controlling party, provides a perfect illustration of how the Rotterdam Rules are doing what needs to be done.

CHAPTER 6

Consignees' rights in European legal systems

*Frank Stevens**

6.1 Introduction

Only the holder of the bill of lading is entitled to claim delivery of goods carried pursuant to it from the carrier. This exclusive right, essential to the bill of lading's function as a document of title, is explicitly confirmed in several of the continental European maritime laws or codes. Four examples appear below:

Belgium, Art. 89 of the Maritime Law

Alleen hij die houder is van het cognossement, zelfs krachtens een endossement in blanco, heeft het recht om zich de lading door de kapitein te doen afleveren.

Le porteur du connaissement, même en vertu d'un endossement en blanc, a seul droit de se faire délivrer le chargement par le capitaine.

Only the holder of the bill of lading, even pursuant to an endorsement in blank, has the right to have the Master deliver the cargo to him.

France, Art. 49 of décret 66-1078

Le capitaine ou le consignataire du navire doit livrer la marchandise au destinataire ou à son représentant.

The Master or the ship's agent must deliver the goods to the consignee or his representative.

Germany, § 519 Commercial Code (HGB)

Die im Konnossement verbrieften seefrachtvertraglichen Ansprüche können nur von dem aus dem Konnossement Berechtigten geltend gemacht werden.

The carriage claims that are incorporated in the bill of lading can only be pursued by the party entitled under the bill of lading.

Netherlands, Art. 8:441 Civil Code

Indien een cognossement is afgegeven, heeft uitsluitend de regelmatige houder daarvan, tenzij hij niet op rechtmatige wijze houder is geworden, jegens de vervoerder onder het cognossement het recht aflevering van de zaken overeenkomstig de op de vervoerder rustende verplichtingen te vorderen.

If a bill of lading has been issued, only the proper holder thereof, unless he did not become holder in a lawful way, is entitled to claim from the carrier under the bill of lading delivery of the cargo in accordance with the obligations to which the carrier is held.

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The principle is, of course, well known and uncontested, but its consequences can occasionally still catch parties unaware. In the French decision in *The Diana*,¹ a French seller had sold equipment to an Iraqi buyer. For the carriage, the seller contracted with Mondial Fret, which in turn instructed a subcontractor, Caillaud. Mondial issued a FIATA bill of lading, and the ocean carrier issued its own bill of lading to the order of Caillaud. The equipment arrived in good order and was delivered to the buyer against the FIATA bill issued by Mondial. The latter, however, went bankrupt before it could reimburse the ocean freight that Caillaud had advanced to the ocean carrier. Caillaud then sued the ocean carrier, claiming that it had suffered a loss because the carrier had delivered the goods to a party not entitled under the bill of lading issued by it. The Cour d'Appel of Aix-en-Provence dismissed the claim, holding that Caillaud had never been the owner of the goods, that neither the shipper nor the real consignee had ever claimed for transport damage, that the reason for Caillaud's not being paid was simply the bankruptcy of its principal, and that in those circumstances, Caillaud could not hold the carrier liable for having delivered the goods without presentation of the bill of lading.² The Cour de Cassation, however, reversed the decision, holding that since Caillaud had been the holder of the bill of lading, the Court of Appeal could not legitimately have reached the conclusion it did reach.

Who exactly, however, is the 'holder' in the legal sense of the word? If the goods are delivered in damaged condition, or are not delivered at all, is the right to claim compensation from the carrier also exclusive to the holder? Does the holder have to prove that they personally suffered loss or damage in order to have title to sue? And what, finally, is the position of the real party in interest in this respect?

6.2 The holder entitled to delivery

The holder in the legal sense of the term, the person who is entitled to exercise the rights under the bill of lading, is not simply the person who happens to physically hold some or all of the original bills of lading. To be a legal holder of a bill of lading, they must pass a double test (often described as a formal and a material test). First, they must be the proper holder of the bill of lading in the light of the type of bill of lading in issue. And secondly, they must be the lawful holder of that bill of lading.

This dichotomy is explicit in the Dutch Civil Code, where Art. 8:441 requires the holder to be both '*regelmatig*' (proper) and '*rechtmatig*' (lawful), and even more explicit in § 519 of the 2013 revision of the German Commercial Code (*HGB*), which distinguishes between '*der aus dem Konnossement Berechtigte*' (the party entitled under the bill of lading) and '*der legitimierten Besitzer des Konnossements*' (the legitimate holder of the bill of lading). The legitimate holder is presumed to be the party entitled under the bill of lading, but counterproof is possible.³

1 Cass. Com. 31.3.1987, Pourvoi No 85-10605, *D.M.F.* 1988, p. 451 (Navire *Diana*).

2 Aix-en-Provence 3.10.1984, *D.M.F.* 1986, p. 160.

3 See B. Czerwenka, *Das Gesetz zur Reform des Seehandelsrechts*, Cologne, Bundesanzeiger Verlag, 2014, no 7, p. 183.

6.2.1 The formal test: the proper holder

Who is the ‘proper’ holder of a bill of lading depends on the type of bill of lading in issue. With a straight bill of lading, the proper holder is the party identified as consignee in the document. With an order bill, the proper holder is the party whose name comes at the end of an uninterrupted chain of endorsements. Finally, with a bearer bill, the proper holder is simply the party that physically possesses it.

These definitions are explicitly set out in the French and German codes:

France, Art. 49 of décret 66–1078

Le destinataire est celui dont le nom est indiqué dans le connaissement à personne dénommée; c’est celui qui présente le connaissement à l’arrivée lorsque le connaissement est au porteur; c’est le dernier endossataire dans le connaissement à ordre.

The consignee is he whose name is indicated in the straight bill of lading; it is he who presents the bill of lading at arrival when the bill of lading is made out to bearer; it is the final endorsee of a bill of lading to order.

Germany, § 519 HGB

Zugunsten des legitimierten Besitzers des Konnossements wird vermutet, dass er der aus dem Konnossement Berechtigte ist. Legitimierter Besitzer des Konnossements ist, wer ein Konnossement besitzt, das

1. *auf den Inhaber lautet,*
2. *an Order lautet und den Besitzer als Empfänger benennt oder durch eine ununterbrochene Reihe von Indossamenten ausweist oder*
3. *auf den Namen des Besitzers lautet.*

There is a presumption in favour of the legitimized holder of the bill of lading that he is the party entitled under the bill of lading. The legitimized holder of a bill of lading is he who holds a bill of lading that

1. is made out to bearer,
2. is to order and identifies the holder as consignee or leads to the holder through an uninterrupted chain of endorsements, or
3. is in the name of the holder.

Belgium and the Netherlands do not have explicit definitions in their codes, but apply the same principles.⁴

In practice, these formal requirements give rise to several issues. What happens, first, when the bill of lading never reaches the intended holder but remains in the hands of the shipper? Second, problems also arise when the (commercial) parties apply the (legal) rules loosely and handle or transfer bills of lading in improper ways. Third, there may be difficulties when the bill of lading is presented by an agent.

⁴ Belgium: see F. Stevens, *Vervoer onder cognossement*, Gent, Larcier, 2001, nr. 345–347, p. 201; F. Stevens, ‘Maritiem procesrecht’, *T.B.H.* 2008, nr. 11–14, p. 606–609.

Netherlands: A. Mahmoud & N. Margetson, ‘Actieve legitimatie’, in M. Hendrikse & N. Margetson, *Capita Zeerecht. Een praktische benadering van de overeenkomst van goederenvervoer over zee* (Kluwer, 2004), p. 147.

(a) The bill of lading in the hands of the shipper

The holder of a bearer bill of lading is the person physically possessing the document. If such a bill of lading is still held by the shipper, because they have not (yet) forwarded it to another party, then they are the legal holder of it and can enforce the rights under it. What is the situation, however, when the shipper holds a straight bill or an order bill? The Dutch courts have accepted that a shipper who is still in possession of the originals of a straight bill of lading can enforce the rights arising under it.⁵ An order bill of lading, which is simply made out 'to order', is considered to be to the order of the shipper.⁶ As long as the shipper has not endorsed the bill of lading to another party, they remain the legal holder. If the bill of lading is made out to the order of a specific person, there is discussion as to whether it must be endorsed by the shipper or whether it is sufficient that it is simply forwarded to the indicated person. In any case, as long as the shipper retains physical possession of the bill, it seems clear that in this case, also, they should be considered the legal holder of it.

The Bundesgerichtshof (the German Supreme Court) in the *Dithmarschen* case⁷ even went a step further than this. A Moroccan company had sold a consignment of locust beans to a Swiss trader, which in turn had sold the goods to an Irish buyer. The sale being on an FOB basis, the Swiss trader chartered the *Dithmarschen* to carry the goods from Morocco to Ireland. The shipowner issued a bill of lading 'to order', indicating the Swiss trader as both shipper and notify party. All the originals of this bill of lading were handed over to the Moroccan seller. Upon arrival of the vessel in Ireland, however, the Swiss trader instructed the shipowner to deliver the goods to the Irish buyer without presentation of the bill of lading; the shipowner complied. The Swiss trader (who himself had been paid by the Irish buyer) did not pay the Moroccan seller, and the latter sued the carrier for the value of the goods. The carrier argued that he had acted on the instructions of his charterer, and that in any case the Moroccan seller did not have title to sue, as the bill of lading did not identify him as either shipper or consignee; nor had it been indorsed to him. However, the Hamburg Oberlandesgericht, and later the

5 *Rechtbank Rotterdam* 22.2.2012, *S&S* 2013, 1 (case HAZA 05-2684, ms. *NDS Prospector*) ('On the bill of lading (. . .) is indicated as shipper "DR.SEX 1235 GETMA P/C S.I.T." and as consignee "AFRAM HOUT B.V." On the same grounds as mentioned above this Getma must be considered the first holder of this straight bill of lading. As long as Getma had not forwarded the bill of lading to Afram the former was entitled to delivery, after that moment Afram would have been the only party entitled to delivery').

See too *Rechtbank Rotterdam* 10.10.2012, *S&S* 2013, 38 (case HAZA 09-3114, ms. *MSC Daniela*) ('Milk is indeed indicated in the straight bill of lading as shipper, and for as long as the bill of lading is not in the power of consignee Century (and this is not the case), Milk must be considered the proper holder thereof').

6 The German Commercial Code (*HGB*) as revised in 2013 explicitly confirms this in § 513 (1): 'Der Verfrachter hat, sofern im Stückgutfrachtvertrag nicht etwas Abweichendes vereinbart ist, dem Ablader auf dessen Verlangen ein Orderkommesement auszustellen, das nach Wahl des Abladers an dessen Order, an die Order des Empfängers oder lediglich an Order zu stellen ist; im letzteren Fall ist unter der Order die Order des Abladers zu verstehen.' (Unless the contract of carriage provides otherwise, the carrier must at the shipper's request issue an order bill of lading, made out at the shipper's option to his order, to the order of the consignee, or simply to order; in the last case, to order means to order of the shipper.)

7 *BGH* 25.4.1988, *TranspR* 1988, 288 (on appeal from *OLG Hamburg* 11.9.1986, *TranspR* 1987, 69).

Bundesgerichtshof, disagreed. They decided that instructions from a charterer or shipper could not set aside or supersede the rights of the holder of the bill of lading; that if a charterer or shipper instructed the carrier to release the goods without presentation of the bill of lading, the carrier should make sure that the bills of lading were returned to them; and that if they failed to do so, they delivered the goods at their own risk. Both courts also held that, given the circumstances of the case, the Moroccan seller was the shipper in the legal sense of the word, even though the bill of lading itself identified the Swiss trader as the shipper. The Moroccan seller had therefore been entitled to receive the bills of lading from the carrier (and the ship's agent had acted correctly in releasing them to him); it followed that since he had not yet forwarded the bills to the Swiss trader, he had title to sue the carrier.

(b) Improper use of the bill of lading

Commercial parties dealing with bills of lading do not always comply with the rules. It does happen, for instance, that they 'endorse' a straight bill, or simply hand over an order bill without properly endorsing it. The Belgian courts tend to be quite understanding of such 'mistakes'. The Antwerp Hof van Beroep (Court of Appeal) has held that when a straight bill of lading is 'endorsed', the endorsement takes effect as an assignment of the rights incorporated in the bill, which is notified to the carrier by the fact that the bill is presented to the carrier with the 'endorsement' upon the document and accepted by the carrier by the delivery of the goods.⁸ With regard to missing endorsements, the Belgian Cour de Cassation has held that the ultimate holder of the bill of lading is nevertheless entitled to exercise the rights under the bill of lading, if the carrier knew or should have known that the absence of an endorsement from the chain was due to an oversight or error.⁹ It hardly needs to be pointed out that this is not the strictest of tests and leaves quite a bit of leeway for the triers of fact. In France, the Bordeaux Cour d'Appel has held that the buyer of goods, who held all originals of an order bill of lading, was entitled to act on that bill of lading, even though it had not been endorsed to the buyer by the shipper.¹⁰

⁸ *Hof van Beroep*, Antwerp, 22.10.2001, unreported, case 1999/AR/511. An assignment of rights under Belgian law requires a notification to the debtor, but the formal requirements that existed with regard to this notification have been abolished.

⁹ *Cass.* 9 June 1969, *Arr.Cass.* 1969, 974, *Pas.* 1969, I, 902, *R.H.A.* 1973, 415, *R.W.* 1969–1970, 805.

¹⁰ *Bordeaux*, 6.5.2009, confirmed by *Cass. Comm.* 3.11.2010, case 09–69627. The case involved the sale and carriage of coffee from Indonesia to Armenia. The Indonesian exporter sold to André & Cie, who sold it on to an Armenian customer. On one occasion, the Armenian customer, using forged bills of lading, obtained delivery of the coffee without paying for it, and André claimed under a cargo policy as holder of the bill of lading. In order to do so, the bill of lading should have been properly endorsed to André, which was not the case. The Court of Appeal held that André could indeed sue the insurers as it was able to produce all originals of the bill of lading. The French Supreme Court confirmed the decision, but on the ground that André itself had bought the insurance and therefore was entitled to sue the insurers.

The Dutch courts, on the other hand, would probably take a stricter view on the matter.¹¹ The *Heliopolis Star* decision of the Dutch Supreme Court¹² is an illustration, albeit in rather special circumstances. The Dutch company Van Meer was a regular exporter of fodder from the Netherlands to buyers in Egypt. Van Meer had these shipments handled by Damco, a Dutch forwarding company. At a certain point, Van Meer owed a substantial amount of money to Damco, and the latter grew worried about payment. At the next shipment, therefore, Damco collected the original bills of lading from the carrier (Heliopolis) and then refused to surrender them to Van Meer unless its invoices were paid in full. Van Meer, however, unimpressed by this gambit from its forwarder, simply instructed the carrier to deliver the goods without presentation of the bills of lading, which the carrier did. Damco, thus left with a worthless spent bill of lading, then arrested the *Heliopolis Sky* to secure its alleged claim against Heliopolis. Damco claimed to be the proper and lawful holder of the bills of lading, and in addition to have a lien on them under the Dutch Freight Forwarders' Conditions, and argued that by delivering the cargo without their presentation, Heliopolis had violated its duty as a carrier, which breach had prejudiced Damco's position. Heliopolis challenged the arrest of its vessel before the President of the Middelburg Court and, having lost there, before the Hague Court of Appeal. It is important to note, however, that in such proceedings, the court's review is only a *prima facie* review: the arrest would be sustained if the creditor (Damco) could reasonably allege a claim on the merits against the shipowner (Heliopolis). Both the first instance court and the Court of Appeal allowed the arrest to stand, accepting that Damco was indeed the proper and lawful holder of the bill of lading. How that could be the case when the bill of lading named Van Meer as the shipper and was issued to the order of an Egyptian bank was not addressed in the first two decisions, probably because the case was not argued that way by the parties. Where the first two courts held that Damco was the lawful holder of the bills of lading, they probably meant that there was nothing unusual or unlawful in that Damco, acting as a freight forwarder for the shipper, collected the bills of lading from the carrier and thus obtained *physical* possession of the documents. Heliopolis then appealed the case to the Hoge Raad (the Dutch Supreme Court), this time arguing explicitly that Damco could not be the proper holder of the bill, as it was neither the shipper nor the consignee, and the document had not been endorsed to it. The Hoge Raad accepted the argument and held that, since the bill of lading had not been endorsed yet, only the named shipper (Van Meer) could be seen as the proper holder of the bill of lading.¹³ The fact that a freight forwarder (Damco), acting on behalf of the shipper, physically collected the bill of lading from the carrier did not entitle that

11 See H. Logmans, *Zekerheid op lading* (Uitgeverij Paris, 2011), p. 277, expressing the view that if A endorses a bill of lading to B, and C to D, but an endorsement by B to C is missing, the ultimate holder (D) would not be entitled to claim. Note too A. Mahmoud & N. Margetson, 'Actieve legitimatie', in M. Hendrikse & N. Margetson, *Capita Zeerecht. Een praktische benadering van de overeenkomst van goederenvervoer over zee*, Deventer, Kluwer, 2004, p. 150.

12 *Hoge Raad* 27.1.1995, *Nf* 1997, 194, *S&S* 1995, 40 (ms. *Heliopolis Star*).

13 In a factually similar French case, where a bill of lading had been endorsed in blank, the Rouen Cour d'Appel held that the freight forwarder could indeed exercise a right of retention on the original

forwarder to exercise the rights under it. The lien argument was also rejected, as the court held that in order for a lien on a straight or an order bill to be effective, it must have been notified in accordance with the requirements of Dutch law. The simple possession of such document (even though that possession in itself was not unlawful under the circumstances) does not give the possessor rights *vis-à-vis* the carrier.

The *Bukhta Novik* decision¹⁴ is another illustration of the strictness of the Dutch courts in this respect. The bill of lading for the shipment of a cargo of apples from the Netherlands to Russia listed 'Steltenpool *on behalf of* Beltecom' as the shipper and was to the order of the Russian buyer. The carrier delivered the apples to the buyer without presentation of the bill of lading, and Steltenpool, who had not been paid by the buyer, sued the carrier for compensation. However, an Alkmaar court, and later the Amsterdam Gerechtshof (Court of Appeal), held that, based on the indications in the bill of lading, Steltenpool had acted merely as agent for Beltecom, so that only the latter had title to sue. Neither the fact that Steltenpool produced its invoice for the sale of the apples to the buyer and had all originals of the bill of lading in its possession, nor the consideration that it was entirely unclear what the role of Beltecom could have been in transaction, were sufficient for the courts.¹⁵

(c) Presentation by an agent

It happens frequently in practice that a bill of lading is presented not by the buyer or owner of the goods (the real party in interest), but by an agent of the latter, typically a forwarder. Which of them is the holder, in the legal sense of the term, of the bill of lading?

The answer is clear and simple in theory, though not always easily applied in practice. It depends on what the agent tells the carrier when presenting the bill of lading. If he tells the carrier that he is presenting it on behalf of an identified principal, then this principal is the legal holder of the bill and entitled to sue under it. If the agent does not inform the carrier of the fact that he is acting as an agent and of the identity of their principal, then he is the legal holder of the bill.¹⁶ The relevant moment is the moment that the agent presents the bill of lading to the carrier to obtain delivery of the goods: only the information that was given

bills of lading, and that he had suffered a loss by the carrier's delivering the goods without presentation of the bills. (See *Rouen*, 4.3.2010, No 09/01740, *Transidit* 2011, No 61, p. 9.)

14 Gerechtshof Amsterdam 19.6.2003, *S&S* 2003, 134 (*Bukhta Novik*).

15 In its decision, the Amsterdam Gerechtshof points out that it is very important for the carrier under a bill of lading to be certain about the identity of its counterpart in the contract of carriage, so that the carrier does not have to become involved in the question of who is entitled under the bill of lading, which is often difficult or impossible to answer for the carrier. This is, of course, true where it regards *delivery*. The master of a ship can hardly be expected to don a wig and gown in every port of call and decide who has the better right to the goods in the holds. It is rather strange, however, to see this argument raised in legal proceedings, where the parties have to produce evidence anyhow, where there is no (or much less) time pressure and where there are professional judges at hand whose job it is to decide issues between parties.

16 H. Boonk, *Zeerecht en IPR* (Kluwer, 1998), p. 149; A. Mahmoud & N. Margetson, 'Actieve legitimatie', in M. Hendrikse & N. Margetson, *Capita Zeerecht. Een praktische benadering van de overeenkomst van goederenvervoer over zee* (Kluwer, 2004), p. 151.

to the carrier at that time is relevant. Even if the carrier knows full well that the party presenting the bill of lading is a forwarder and thus acting on behalf of someone else, and suspects or later learns the identity of the principal, it is still the forwarder who is considered the legal holder of the bill of lading. In a real world case, however, it is often (very) difficult to prove what exactly the forwarder told the carrier, and whether or not this was sufficient notice of the fact that the forwarder was only acting as an agent for a disclosed principal.¹⁷

6.2.2 *The material test: the lawful holder*

Once established that the holder of a bill of lading is indeed the proper holder – the named consignee under a straight bill, the last endorsee under an order bill, or the bearer of a bearer bill – there is still a second test to be satisfied. The proper holder must hold, and exercise the rights under the bill, in a *lawful* way.

Under Belgian law, this is a negative requirement. The holder of the bill must not be acting in bad faith, but good faith is presumed and the burden of proving bad faith lies entirely with the carrier.¹⁸ In practice, there are only very few cases in which the holder will be held to be acting in bad faith. In the *Sealand Consumer* case,¹⁹ the Antwerp Hof van Beroep held that a consignee who had initially refused the goods but later on, after he had failed to recover the price from the seller, nevertheless presented the bill and asked for delivery, was not acting in good faith and did not have a claim against the carrier any more. The same court later held²⁰ that a seller, who had granted a price reduction to the buyer, could not later present the bill of lading to the carrier in an attempt to recover the price reduction from the carrier, even though the latter had delivered the cargo to the buyer without presentation of a bill of lading.

In France, the position is similar. In the case of *Le Rêve*,²¹ a French farming cooperative sold a cargo of rapeseed to Kampffmeyer France, subject to a retention of title clause. Kampffmeyer France sold the seed on, endorsing the bill of lading to Kampffmeyer Germany, which in turn sold the goods and endorsed the bill to Margarine Verkaufs Union (MVU). MVU paid Kampffmeyer Germany, which on that very day declared bankruptcy. As a result, the cooperative was not paid. It therefore attached the goods, invoking the retention of title clause in the sales contract. MVU also claimed the goods, invoking the fact that it was the holder of the bill of lading. The Bourges Cour d'Appel, in a decision confirmed by the Cour de Cassation, held that MVU, which (through the bill of lading) possessed

17 Compare H. Boonk, *Zeevervoer onder cognossement* (Gouda Quint, 1993), pp. 28–29; W. Snijders, 'De expediteur als tussenpersoon bij zeevervoer en de positie van de cognossementhouder', *R.M.T.* 1969 (3), p. 6.

18 F. Stevens, *Vervoer onder cognossement* (Larcier, 2001), nr. 275, p. 156.

19 *Hof van Beroep*, Antwerp, 21.5.1980, *R.H.A.* 1979–1980, 447 (ms *Sealand Consumer*).

20 *Hof van Beroep*, Antwerp, 5.10.1982 (ms *Myster*), unreported but discussed in L. Delwaide & J. Blockx, 'Kroniek van zeerecht. Overzicht van rechtspraak en rechtsleer 1976–1988', *T.P.R.* 1990, no 52, p. 571 (fn. 238).

21 *Cass. Com.* 3.3.1987, Pourvoi No 85–16138, not reported (Navire *Le Rêve*). This was an inland shipping case, but the principles equally apply to ocean bills of lading.

the goods, had the better title. It also held that the cooperative's argument that MVU had been aware of the retention of title clause and had acted in bad faith was not proven.

There is, however, a remarkable decision of the Antwerp Hof van Beroep, in which the actual holder of the bill of lading, although not acting in bad faith, still did not have rights against the carrier under it. In the *Pietersgracht* decision,²² a German seller had sold a new brewing plant to a Mexican brewery. The seller organized the transport of the parts of the new plant from Germany to the port of Antwerp itself, and instructed Samskip to carry the goods from Antwerp to inland Mexico, where the new brewery was to be built. Samskip charged Spliethoff with the sea carriage from Antwerp to Altamira, and a Mexican road haulier with the on-carriage from Altamira to destination. Samskip issued an ocean bill of lading for the sea leg from Antwerp to Altamira. When the cargo was damaged on board, the Mexican brewery sued Samskip under this bill of lading. The Antwerp Hof van Beroep, however, held that it was not entitled to do so, as the Samskip bill of lading had never been used as a 'real' bill of lading, i.e. in order to obtain delivery of the goods. It had not been presented to the sea carrier (Spliethoff) in Altamira by either the Mexican on-carrier or the brewery, nor had it been presented to the road haulier at final destination. As it turned out, the bill of lading had apparently only been issued and used for customs purposes, to enable the brewery to declare the goods to the Mexican customs. The court held that 'the mere fact that a party is named in the bill of lading does not make this party the holder of the bill of lading in the legal sense of the term; the [legal] holder of the bill of lading is he who presents the bill of lading to the carrier to obtain delivery of the goods'.

In contrast to Belgian law, however, Dutch law approaches the lawful character of the holder's possession of the bill of lading much more as a separate and positive requirement.²³ In part, this is due to the fact that Dutch law has a tendency to investigate and evaluate the transaction that resulted in the claimant becoming the holder of the bill of lading. Some Dutch authors are of the opinion that the holder of a bill of lading is only a lawful holder if they have acquired (property) rights to the goods described in the bill of lading. In this (strict) view, a freight forwarder who has been entrusted the bill of lading to collect the goods from the carrier is not a 'lawful' holder of the bill of lading and cannot sue under it. The more accepted view, however, is that the holder is a lawful holder as long as they have acquired the bill of lading in a lawful way (e.g. as an agent for a principal, as a lienholder, etc.).

This is not always the case, though, as is illustrated in the *Ladoga 15* case.²⁴ Anglo Normande had sold a consignment of vodka to a Russian company Kredo, to be carried from Antwerp to Moscow. Initially, the parties had agreed that Anglo

²² *Hof van Beroep*, Antwerp, 5.10.2009, Case No 2008/AR/820, *T.B.H.* 2010, 93 (*Pietersgracht*).

²³ Compare A. Mahmoud & N. Margetson, 'Actieve legitimatie', in M. Hendrikse & N. Margetson, *Capita Zeerecht. Een praktische benadering van de overeenkomst van goederenvervoer over zee* (Kluwer, 2004), p. 177.

²⁴ *Hoge Raad*, 29.11.2002, *S&S* 2003, 62.

Normande would arrange (and pay) the entire carriage: by sea from Antwerp to St Petersburg, and then by road from St Petersburg to Moscow. Anglo Normande entered into a contract of carriage with North Western Shipping Co, which issued a straight bill of lading, indicating Anglo Normande as shipper and Kredo as consignee. North Western sent one original of the bill of lading to Vneshttrans, its usual forwarder in St Petersburg, to arrange on-carriage to Moscow. Because of difficulties in the arranging of this on-carriage, however, Anglo Normande and Kredo decided to amend their sale contract; it was agreed that Anglo Normande would now deliver the vodka in St Petersburg, and that Kredo would take care of the on-carriage. Kredo contacted Vneshttrans, the same forwarding company previously instructed by the carrier North Western, which had already received from North Western an original bill of lading. Although Anglo Normande explicitly instructed North Western not to deliver the shipment to Kredo, North Western nevertheless did so. Kredo never paid the price, and Anglo Normande²⁵ sued the carrier. The carrier, in its defence, argued that it had delivered the goods to the consignee named in the straight bill of lading (Kredo), who had presented an original copy of the bill of lading through its freight forwarder, and that therefore the delivery to Kredo had been entirely lawful. The *Gerechtshof* in The Hague accepted this defence, and held that Kredo had indeed become the proper and lawful holder of the bill of lading and thus entitled to claim delivery from the carrier. Anglo Normande appealed to the *Hoge Raad*, which reversed the decision of the *Gerechtshof* and held that the carrier had not been entitled to deliver the vodka to Kredo. In essence, it found that, given the circumstances, Kredo had not acquired the bill of lading in a lawful way.

The decision was not phrased in those words, though, since the parties and the Court of Appeal explicitly referred to the Supreme Court's earlier decision in *The Eendracht*, thus requiring the court to tie in the *Ladoga 15* decision with that earlier decision. Both cases involved a straight bill of lading. There is a clear majority view in the Netherlands that a straight bill of lading contains a third party beneficiary clause in favour of the named consignee, which the latter accepts by presenting the bill of lading to the carrier. In *The Eendracht*, pieces of brewing equipment had been damaged early in the sea voyage, and the shipper, consignee and carrier had jointly decided to return the equipment to the shipper for repairs. Afterwards, the consignee sued the carrier for the repair costs, and the carrier argued that the consignee had not presented the bill of lading, thus had not become a party to the contract of carriage, and thus could not sue the carrier. To this, the *Hoge Raad* replied that although presentation of the bill of lading was the obvious way to accept the third party beneficiary clause, it was not the only way, and that in the circumstances of the case, given the joint agreement between all parties involved, the consignee had indeed accepted the third party beneficiary clause and become a party to the contract. In *Ladoga 15*, Kredo argued that it had accepted the third party beneficiary clause, become a party to the contract and thus gained an

²⁵ In fact, Anglo Normande had assigned its right against the carrier to another party (Galibert & Varon), and it was this other party that pursued the claim against the carrier, but that is not relevant to the issues discussed here.

entitlement to delivery. The court, however, held that, although presentation of the bill of lading was not the only way to accept the third party beneficiary clause (as made clear in *The Eendracht*), the consequence was not that such clause could be accepted in any way and at any time whatsoever. Given the fact, however, that Kredo *did actually present* the bill of lading (through an agent), and that nobody ever doubted that by presenting the bill of lading the holder accepted the third party beneficiary clause, the Hoge Raad must have meant that Kredo, because of the way in which it had gained possession of the bill of lading, had *not been entitled* to present the bill of lading to the carrier.

Under German law, if the carrier knew, or should have known had they not been grossly negligent, that the (formally legitimate) holder of the bill of lading was in truth not the party entitled under it, they are bound not to release the goods to such holder.²⁶

6.3 The right to claim damages

The right to claim delivery belongs exclusively to the holder of the bill of lading. This rule is a prerequisite for the bill of lading to function as a document of title, and serves as protection for the carrier. When other parties claim to have a better right to the goods than the holder of the bill, the carrier is obviously not the proper person to decide on such claims. With regard to delivery, therefore, the rule is written in stone. What happens, however, if the goods are lost or damaged, and the claim is no longer for delivery, but for compensation? Does that claim still belong exclusively to the holder of the bill of lading?

Under Belgian and Dutch law, the answer is yes. The claim for compensation is seen as the claim for delivery, ‘morphed’ into another form. If the carrier cannot deliver the goods themselves, they must ‘deliver’ a sum of money instead. Since the claim for delivery belongs exclusively to the holder of the bill, the claim for compensation can equally only be pursued by that holder.²⁷ In addition, it would also be conceptually difficult to explain how a non-holder of the bill of lading could exercise rights under it, if such a right of action was recognized.

In practice, however, the holder of the bill of lading is often not the real party in interest, and does not personally suffer any loss when goods are lost or damaged during the voyage. That of course creates the possibility of a liability gap: the holder of the bill of lading has title to sue but has not suffered a loss, while the party that did suffer the loss does not have title to sue. Belgian and Dutch law have solved most of this problem by accepting that the holder of the bill of lading always has title to sue, simply by virtue of their capacity as holder, without the need to have suffered any personal loss. The principle has explicitly been confirmed by the

²⁶ *Münchener Kommentar HGB*, Band 7 (3rd edn, C.H. Beck, 2014), no 3, p. 961.

²⁷ S. Roland, ‘Vorderingsgerechtigdheid in het zeerecht’, in E. Van Hooydonk, *Actualia zee- en vervoerrecht* (Maklu, 2003), p. 80; F. Stevens, ‘Maritiem procesrecht’, *T.B.H.* 2008, no 6, p. 605. See too H. Boonk, *Zeevervoer onder cognossement* (Gouda Quint, 1993), p. 28; H. Boonk, *Zeerecht en IPR* (Kluwer, 1998), p. 149.

Belgian Cour de Cassation in the *Herm f* decision,²⁸ and is currently undisputed.²⁹

In France, the courts initially also limited the right of action to the holder of the bill of lading.³⁰ In the *Laura* decision,³¹ for instance, the Cour de Cassation held that when a bill of lading has been issued, a claim for damages can only be pursued by the proper holder of that bill of lading.

The French courts, however, in contrast to their Belgian and Dutch counterparts, continued in addition to require the claimant under a bill of lading to have suffered a personal loss.³² That of course makes the possibility of a liability gap very real, and there are indeed a number of published cases in which the carrier escaped liability altogether because the party that actually suffered the loss was held not to have standing to sue the carrier. In the *Laura*, already referred to, a consignment of frozen meat had been shipped from Genoa to Turkey (for on-carriage to Iran), and had been refused by the buyer in the discharge port. The buyer failed in addition to pay the price, and the seller/shipper sued the carrier. The Paris Cour d'Appel allowed the claim, but this decision was reversed by the Cour de Cassation, because the shipper had ceased to be the holder of the bill of lading.

In the *Mercandia Transporter II* affair, however, such problems resulted in a marked change in the French position in this respect. A French company, Kahes Equipement, had sold two cranes to a buyer in Saudi Arabia. On arrival in Damman, one of the cranes was found to have been damaged and returned to France. Kahes and its insurers sued the carrier to recover the resulting costs (return to France, repair, reshipment to Damman). The Cour d'Appel in Aix-en-Provence held that, despite clear authority in the case law that the holder of the bill of lading could sue the carrier, the shipper, as a party to the contract of carriage, could *also* sue the carrier if they were the one to have suffered loss,³³ whereupon the carrier appealed to the Cour de Cassation. The Commercial Division (Chambre commerciale) of that court, in line with its earlier decisions, held that only the holder of the bill had title to sue, set aside the decision of the Cour d'Appel in Aix-en-Provence and remanded the case to the Cour d'Appel in Montpellier. This court, however, refused to accept the decision of the Cour de Cassation and again

28 Cass. 11.1.1991, *Arr.Cass.* 1991, 486, *R.W.* 1990–1991, 1434, *R.H.A.* 1992, 82 (ms *Herm f*).

29 Belgium: J. Loyens, *Handboek Transportrecht* (Intersentia, 2011), no 486, pp. 350–351; F. Stevens, 'Maritiem procesrecht', *T.B.H.* 2008, no 7, p. 605; P. Verguts, 'De overeenkomst van zeevervoer', in A. Poelmans, 'Overzicht van rechtspraak. Vervoersrecht. 1976–2012', *T.P.R.* 2013, (1607), no 197, p. 2297. Netherlands: H. Boonk, *Zeevervoer onder cognossement* (Gouda Quint, 1993), p. 28; H. Boonk, *Zeerecht en IPR* (Kluwer, 1998), p. 149.

30 P. Bonassies & C. Scapel, *Droit maritime* (L.G.D.J., 2006), no 1132, pp. 727–728; P. Delebecque, *Droit maritime* (13th edn, Dalloz, 2014), no 763, pp. 543–544; M. Remond-Gouilloud, *Droit maritime* (2nd edn, Pedone, 1993), no 611, p. 394.

31 Cass. Com. 7.4.1987, *Bull.* 1987 IV No 92, p. 70 (Pourvoi No 84–17232, Navire *Laura*) ('Attendu que, lorsqu'un connaissement a été émis, l'action en réparation du préjudice résultant des avaries ou des pertes causées par la mauvaise exécution du contrat de transport, ne peut être exercée que par le porteur régulier de ce titre, titulaire des droits sur la marchandise').

32 P. Bonassies & C. Scapel, *Droit maritime* (L.G.D.J., 2006), no 1127, p. 725 and no 1129–1130, pp. 726–727; P. Delebecque, *Droit maritime* (13th edn, Dalloz, 2014), no 764, p. 545.

33 *Aix-en-Provence*, 10.5.1983.

held that Kahes was entitled to sue and recover from the carrier.³⁴ The carrier again appealed to the Cour de Cassation, which in its Assemblée plénière (i.e. with judges of the Commercial and Civil Divisions combined), changed course and confirmed the decision of the Montpellier court.³⁵ The shipper, if they were the only one to have suffered loss from the carriage, was entitled to sue the carrier.³⁶

This change of course was readily accepted by the lower French courts, and extended to other situations. The *Mercandia Transporter* decision concerned the shipper; later decisions also allowed other real parties in interest to sue the carrier for loss of or damage to the goods carried.³⁷ Currently, French case law allows almost any party that can prove that it suffered a loss as a result of the goods being damaged or lost during the carriage to sue the carrier under the bill of lading.³⁸ In the *Norberg* decision,³⁹ for instance, the seller of a consignment of meat instructed Stefover to carry the meat from inland France to inland Tunisia. Stefover drove the trailer with the meat to Marseilles, where the trailer was loaded on the *Norberg* by a stevedoring company Sagatrans. The bill of lading listed 'Sagatrans [stevedore] on behalf of Sopavia [seller]' as shipper and 'Le Louhoum [buyer]' as consignee. During the voyage, the trailer fell on its side and was damaged, and Stefover sued the carrier for the damage to it. The claim was dismissed by the Cour d'Appel in Aix-en-Provence, on the basis that Stefover was not mentioned in the bill of lading and had not proved that it had been or become a party to the contract of carriage. The Cour de Cassation, however, held that Stefover was the shipper of the trailer, and that the Aix court should have determined whether or not Stefover had suffered damage as a result of a failure in the sea carriage.

Nevertheless, even after the *Mercandia Transporter II* revolution, there are still limits to who can sue the carrier under the bill of lading. In the *Ramona* decision,⁴⁰ Soufflet Negoce had sold 6,500 tons of flour to Agrocean, which onsold it to Serharca on a CIF 'delivered weight' basis. The bill of lading was issued to the order of Agrocean, which endorsed it to Serharca. At destination, the flour was delivered with a shortage of 132 tons. That loss, however, was not suffered by the consignee (Serharca), which only had to pay for the delivered weight, but by the intermediary

34 *Montpellier*, 1.12.1987, *D.M.F.* 1988, p. 250.

35 *Cass.* 22.12.1989, *Bull.* 1989 A.P. No 4, p. 9, *D.M.F.* 1990, p. 29, case note P. Bonassies.

36 The actual wording of the decision leaves something to be desired, as the court states that although the right of action is *exclusive* to the last endorsee of an order bill, the shipper can also sue ('Attendu, ensuite, que, si l'action en responsabilité, pour pertes ou avaries, contre le transporteur maritime, n'appartient qu'au dernier endossataire du connaissement à ordre, cette action est ouverte au chargeur lorsque celui-ci est seul à avoir supporté le préjudice résultant du transport').

37 M. Remond-Gouilloud, *Droit maritime* (2nd edn, Pedone, 1993), no 613, pp. 395–396.

38 P. Bonassies & C. Scapel, *Droit maritime* (L.G.D.J., 2006), no 1136, pp. 730–731; P. Delebecque, *Droit maritime* (13th edn, Dalloz, 2014), no 763, p. 545. See also *Cass. Com.* 7.7.1992, *D.M.F.* 1992, p. 672 (Navire *Renée-Delmas*), case note P. Bonassies; *Cass. Com.* 27.4.1993, *D.M.F.* 1993, p. 382 (Navire *Moulares*), case note Y. Tassel; *Cass. Com.* 27.10.1998, *D.M.F.* 1998, p. 1129 (Navire *Girolata*).

39 *Cass. Com.* 19.12.2000, *Bull.* 2000 IV No 208, p. 180, *D.M.F.* 2001, p. 222, case note P. Bonassies.

40 *Cass. Com.* 19.12.1995, *D.M.F.* 1996, p. 389 (Navire *Ramona*), note P. Bonassies.

holder Agrocean, which had had to pay the full price to the seller. Agrocean sued the carrier, but saw its claim dismissed by the Cour d'Appel in Poitiers, because even if it was the only party to have suffered the loss, it was neither the shipper nor the ultimate endorsee of the bill of lading.⁴¹ On appeal, the Poitiers court's decision was confirmed by the Cour de Cassation.⁴²

German law traditionally distinguishes between the contract of carriage on the one hand, which is made between the shipper and the carrier (and may identify a consignee), and the bill of lading on the other hand, which creates a legal relation between the carrier and the holder of the bill.⁴³ Both relations exist next to each other, and if goods are lost or damaged during carriage, the carrier can potentially be sued both under the contract of carriage by the parties to that contract (the shipper, and possibly a consignee), and also under the bill of lading by the proper holder of that document.⁴⁴ Since the 2013 maritime law reform, however, § 519 of the *HGB* now gives priority to the claim under the bill of lading.⁴⁵ The claims that are incorporated ('*verbriefte*') in the bill of lading can only be pursued by the holder of the bill. Those claims are primarily the claim for delivery, but they also include the claim for compensation in the case of loss or damage.⁴⁶ Claims that are *not* incorporated in the bill of lading (e.g. claims for delay) can still be pursued under the contract of carriage by the parties to the contract,⁴⁷ and they can also bring proceedings against the carrier for loss of or damage to the carried goods when it is clear that the holder of the bill will not do so.⁴⁸

6.4 The real party in interest

The 'real party in interest' is the party that owns the carried goods, or is otherwise interested in those goods, but is not the consignee or the holder of the bill of lading. If the goods are lost or damaged during the carriage, can the real party in interest sue the carrier?

In Belgium, title to sue is strictly limited to the holder of the bill of lading.⁴⁹ Some authors have argued in favour of an extension of the right of action to the real party in interest,⁵⁰ and there is some (mostly older) case law that occasionally

41 *Poitiers*, 30.6.1993, *unreported*.

42 *Cass. Com.* 19.12.1995, *D.M.F.* 1996, p. 389 (*Navire Ramona*), note P. Bonassies.

43 P. Egler, *Seeprivatrechtliche Streitigkeiten unter der EuGVVO* (Springer, 2011), p. 62.

44 O. Hartenstein & F. Reuschle, *Handbuch des Fachanwalts. Transport- und Speditionsrecht* (Luchterhand, 2010), no 217, p. 205; D. Rabe, *Seehandelsrecht* (4th edn, C.H. Beck, 2000), no 39, pp. 566–567.

45 B. Czerwenka, *Das Gesetz zur Reform des Seehandelsrechts* (Bundesanzeiger Verlag, 2014), no 4, p. 182; *Münchener Kommentar HGB*, Band 7 (3rd edn, C.H. Beck, 2014), no 10, p. 962.

46 B. Czerwenka, *Das Gesetz zur Reform des Seehandelsrechts*, Cologne, Bundesanzeiger Verlag, 2014, no 6, p. 183; *Münchener Kommentar HGB*, Band 7, (3rd edn, C.H. Beck, 2014), no 11–12, p. 962.

47 *Münchener Kommentar HGB*, Band 7 (3rd edn, C.H. Beck, 2014), no 13–16, p. 962.

48 *Münchener Kommentar HGB*, Band 7 (3rd edn, C.H. Beck, 2014), no 17, p. 962.

49 See above, Section 6.3.

50 F. Stevens, 'Het vorderingsrecht lastens de zeevervoerder: een kwalitatief recht?', in *Liber Amicorum Roger Roland* (Larcier, 2003), p. 391.

allowed the real party in interest to claim,⁵¹ but this has never become a majority view and there seem to be no recent cases to that effect.

The real party in interest is generally not able to sue the carrier on a tort basis either. Belgian law does not allow tort actions by a contracting party against a ‘performing agent’ (*uitvoeringsagent*, *agent d’exécution*). If A enters into a contract with B, and B then calls upon C to perform part (or all) of his contractual obligations *vis-à-vis* A, A is not allowed to sue C on a tort basis. The reason is that the contract between A and B will often contain defences, limitations, etc., and that it is not considered acceptable for A to circumvent these contractual provisions by suing C directly. In the carriage of goods, for instance, this means that the cargo interests cannot sue the stevedore, because the stevedore is performing part of the carrier’s obligations *vis-à-vis* the cargo and is therefore shielded from claims by the cargo interests. This concept has become so accepted that there is a tendency to apply it almost automatically, even beyond its natural boundaries. If the real party in interest tried to sue the carrier on a tort basis, chances are that the courts would consider the carrier a ‘performing agent’ and disallow the tort claim, even though it is by no means certain that the carrier is indeed performing all or part of the obligations that the freight forwarder (or other party with which the real party in interest has a contract) has *vis-à-vis* the real party in interest.

In the Netherlands, as in Belgium, title to sue is exclusive to the holder of the bill of lading. Here also, occasional attempts have been made to have a right of action recognized in favour of the real party in interest,⁵² but again without much success.

Tort-based claims against the carrier are possible under Dutch law, but require of course that the claimant can satisfy the burden of proof applicable to a tort claim.⁵³ The real party in interest will have to prove that the carrier was guilty of an ‘unlawful act’ (*onrechtmatige daad*) in the sense of Art. 6:162 of the Dutch Civil Code (the *BW*), without the help of the presumptions that are available in transport law. Furthermore, Dutch tort law only obliges the tortfeasor to compensate the damage if the rule of law that the tortfeasor violated served to protect against the

51 *Hof van Beroep*, Brussels, 3.3.1972, *R.H.A.* 1973, p. 445; *Hof van Beroep*, Brussels, 24.12.1965, *R.H.A.* 196, p. 118; *Hof van Beroep*, Ghent, 30.6.1964, *R.H.A.* 1964, p. 347; *Hof van Beroep*, Brussels, 18.1.1951, *R.H.A.* 1951, p. 315. See too *Rechtbank van koophandel*, Antwerp, 20.5.1975, *E.T.L.* 1975, p. 509; *Rechtbank van koophandel*, Antwerp, 1.12.1941, *R.H.A.* 1942, p. 113; *Rechtbank van koophandel*, Antwerp, 30.6.1936, *R.H.A.* 1938, p. 5.

52 A. van der Lelij, *Levering van roerende zaken door middel van een zakenrechtelijk waardepapier* (Kluwer, 1996), and F. Koot, ‘De legitimerende werking van het cognossement’, *T.V.R.* 2002, p. 120, for instance, have argued that when a bill is presented by a freight forwarder, the forwarder is not the lawful holder of the bill – their principal is, and thus the principal (often the real party in interest) is entitled to enforce the rights under the bill against the carrier. See also M. Spanjaart, *Vorderingsrechten uit cognossement* (Uitgeverij Paris, 2012), p. 333, who argues that the right of action under the bill should be accorded to both the shipper and the holder of the B/L, and that third parties can sue the carrier on a tort basis; and, in addition, W. Snijders, ‘De expéditeur als tussenpersoon bij zeevervoer en de positie van de cognossementhouder’, *R.M.T.* 1969, (3), pp. 24–31.

53 H. Boonk, *Zeevervoer onder cognossement* (Gouda Quint, 1993), p. 78; A. Mahmoud & N. Margetson, ‘Actieve legitimatie’, in M. Hendrikse & N. Margetson, *Capita Zeerecht. Een praktische benadering van de overeenkomst van goederenvervoer over zee* (Kluwer, 2004), p. 158; M. Spanjaart, *Vorderingsrechten uit cognossement* (Uitgeverij Paris, 2012), p. 333.

type of damage suffered by the victim (the 'relativity requirement' – Art. 6:163 *BW*). The claimant also has to prove that there was damage, and that the damage was caused by the unlawful act.

If the burden of proof of a tort claim is carried, however, the carrier will still be able to invoke the protection of the Hague-Visby Rules (Art. 4*bis*) and, very often, also contractual protection. Dutch law provides for an intricate set of rules that determine which contract the defendant can invoke if they are sued in relation with the exploitation of the vessel (Arts. 8:360–8:365 *BW*). If, for instance, a shipowner chartered out their vessel to a time charterer, which in turn chartered the vessel out to a voyage charterer which entered into a contract of carriage, and the shipowner is later sued on a tort basis by the real party in interest, they can invoke the provisions of the contract of carriage, even though neither the shipowner nor the real party in interest were parties to that contract (Art. 8:364–2).

French law initially also limited the right of action to the holder of the bill of lading. Since the *Mercandia Transporter II* decision, however, the case law has become much more liberal and now generally allows the real party in interest to sue the carrier under the bill of lading.⁵⁴

Since the real party in interest is able to sue under the bill of lading, there is little need left for tort-based actions. Before *Mercandia Transporter II*, such actions had variously been permitted⁵⁵ and excluded.⁵⁶ In any case, even if a tort claim against the carrier is successful, the latter will still be able to invoke the statutory defences and limitations.⁵⁷

Title to sue under German law lies primarily with the holder of the bill of lading, and subsidiarily with the parties to the contract of carriage.⁵⁸ The real party in interest might be a party to the contract of carriage, and thus entitled to sue. If they are not, they could sue the carrier on a tort basis, provided of course that they could satisfy the burden of proof applicable to such a tort claim. The necessity for the real party in interest to sue is reduced, however, by the German concept of '*Drittschadensliquidation*', i.e. the possibility for a party that has title to sue to recover a loss suffered by a third party.⁵⁹ This makes it possible, for instance, for the holder of the bill of lading to recover the loss suffered by the real party in interest.

⁵⁴ See above, Section 6.3.

⁵⁵ *Paris* 1.12.1982, *D.M.F.* 1983, p. 158; *Aix-en-Provence* 9.12.1958, *D.M.F.* 1959, p. 935. See also P. Bonassies, 'Cass.com. 19.12.1995 (Navire *Ramona*)', *D.M.F.* 1996, 390 (note), p. 392, who argues that an intermediary holder, which cannot sue on the bill of lading, has a tort claim against the carrier.

⁵⁶ *Aix-en-Provence*, 8.10.1980, *D.M.F.* 1981, p. 269, note R. Achard. See also P. Bonassies, 'L'action en responsabilité délictuelle du destinataire réel', *D.M.F.* 1981, pp. 515–523; M. Rémond-Gouilloud, 'De l'action contractuelle à l'action délictuelle: les pièges du non-cumul', *B.T.* 7 February 1986, p. 97.

⁵⁷ See the *Code des Transports*, Art. L.5422–18, al 3 (equivalent to Hague-Visby Rules, Art.IV*bis*.1). See M. Remond-Gouilloud, *Droit maritime* (2nd edn, Pedone, 1993), no 613, p. 396.

⁵⁸ See above, Section 6.3

⁵⁹ *Drittschadensliquidation* is an exception to the standard rules of German substantive and procedural law, and thus is interpreted and applied restrictively, but is generally recognized in the carriage of goods context. See D. Rabe, *Seehandelsrecht* (4th edn, C.H. Beck, 2000), no 41, p. 567.

CHAPTER 7

Discrepant declarations about containerised goods '... in the middle of a chain reaction'

*Professor Dr Olivier Cachard**

Standards in shipping sometimes share the same destiny as standards in pop music: they create a sense of familiarity and broad knowledge, although part of the wording is out of reach of our minds. If some of us share the memories of Diana Ross singing *Chain Reaction* in 1985, absolutely all of us are conscious that, from about the same time, containerisation has dramatically been changing the course of trade in goods and even commodities. But the answer of the international community to this revolution has been rather limited. The UN Convention on International Multimodal Transport of Goods, adopted in high hopes in 1980, never came into force. The Rotterdam Rules have been depicted as 'minimal music' by Ralph de Wit;¹ their entry into effect remains in the future (and the balance). Even in civil law countries where neat conceptualisation is usually cherished, legal science has also played 'minimal music'. The nearest anyone describing the legal nature of the container came to precision came in the (supposedly) comic statement that it was *un truc avec des machines dedans*.²

In the chain of transport operations, the use of sealed containers has engendered a large variety of technical consequences: the use of different types of boxes, new contracts (container lease and lease-back contracts),³ new forms of infrastructure (container freight stations, container terminals), use of novel vessels (feeders and gigantic container vessels), and hitherto unknown combinations of different modes of transportation. But, in the meantime, many of the same fundamental processes still have to be gone through. Goods, even if stuffed in a container, must still be put on board a ship and accepted by the master. Goods still have to be insured. They still have to be paid for through documentary credits, exported from the country of origin and imported in the state of destination. They are merely ensconced in a sealed steel envelope. This fact reinforces even more the role of documents filled in for different purposes, since most business decisions will now have to be made on the exclusive basis of documents, either paper or electronic. The issue of *discrepancy* between declarations and the actual nature and condition

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1 R. De Wit, 'Minimal Music: Multimodal Transport Including a Maritime Leg Under the Rotterdam Rules', in D. R. Thomas (ed), *The Carriage of Goods by Sea Under the Rotterdam Rules*, (Informa, 2010).

2 A thing in which things are stuffed.

3 O. Raison, 'Le propriétaire du conteneur, Transporteur maritime ou sociétés de leasing, les problèmes engendrés par la location de conteneur', DMF 2013, 581 s.

of the goods is obviously critical. The term *discrepancy* has been deliberately chosen here on account of its objectiveness. A *discrepancy* between goods and their description is not necessarily the result of any fraudulent scheme. It could equally result from a mistake, from a breach of contract or from the intervention of a third party.

The accuracy of documents at the moment when the container is stuffed may be checked more easily by the carrier when the cargo is less than a full container load (LCL); that is, the case where an exporter's goods are sent to a *container freight station* and there consolidated with other goods belonging to other exporters in a *groupage container*. The carrier here is themselves responsible for the stuffing of the container and cannot permissibly rely merely on the shipper's declarations. By contrast, when the cargo takes the form of a full container load (FCL), the container is usually delivered empty at a single exporter's premises where it is stuffed by them and them alone. In this case the carrier has no choice but to rely on the shipper's declarations.

If they now consider the full chain of operations necessary to export containerised goods or commodities, the observer realises that the question of reliance on the data transmitted by the exporter is an iterative one. Can the declarant for customs purposes rely on the information transmitted by the exporter? Can the carrier, for transport purposes, rely on the information given by the shipper? Can banks, for documentary credit purposes, rely on the documents listed in the letter of credit in case of container transport? These issues shall be dealt with separately and in turn, even though this may result in a form of incoherence in the treatment of the chain of information.

7.1 Declarations and the burden of the customs debt

Tangible goods stuffed in containers are governed by export licensing regulations in their state of origin and by import controls in the state of destination. In the EU, the applicable regime has so far been based on the Council Regulation establishing the Community Customs Code⁴ (containing 250 provisions) and by the Implementing Regulations⁵ (containing 915 provisions). Different rules are applicable to imports, where import duties have to be levied and paid, and to exports, where export licensing regulations have to be complied with.

7.1.1 *The duty to fill in customs documents*

The exporter is the best placed person to know about the goods or commodities to be exported. From a practical point of view, they know the quantity and the quality of the goods that have been stuffed in the container. From a legal point of view, they should know which of the numerous tariff categories the goods or commodities belong; they should know whether the goods are subject to export duties, import duties or excise duties levied on goods such as alcohol, tobacco or

4 Council Regulation 2913/92 (EEC) of 12 October 1992 (as amended).

5 Commission Regulation 2454/93 (EEC) of 2 July 1993 (as amended).

hydrocarbons. Therefore, one would expect the duty to fill in customs documents to be laid on the exporter, that is, the shipper. Likewise, as containers may be subject to control by customs, one should expect customs documents to be filled in adequately by the shipper. Yet this is not always the case in practice.

As far as exports outside the EU are concerned, it has been said that ‘where exportation does not involve the payment or refund of Customs duties and the goods are not restricted, these formalities are relatively simple’.⁶ Declarations are made on the exporter’s behalf by their agents. Article 788(1) of the Implementing Regulations defines the exporter as ‘... the person on whose behalf the export declaration is made and who is the owner of the goods or has similar right of disposal over them at the time the declaration is accepted’. In the UK, under the new export system, different types of simplified electronic procedures are available, providing the declarant with varying degrees of assistance from the customs authorities: a simplified declaration procedure (SDP), a local clearance procedure (LCP) and a designated export place (DEP). Declarants, i.e. exporters, can lodge pre-shipment declarations without the normal formalities to be carried out at the point of export.

As far as imports within the EU are concerned, things have grown much more complex for safety reasons, with regulations aimed at requiring full transparency of the chain of transport.⁷ This means that the carrier is expected to know exactly what they are carrying in the containers loaded on board, and that this information must be transmitted to the customs of the European port of destination. This transmission will take the shape of a so-called summary declaration to be ‘lodged at the customs office of entry’,⁸ and must be made ‘before the goods are brought into the customs territory of the Community’.⁹ For container transport, the summary declaration indeed has to be made 24 hours before goods are loaded, so as to allow the local customs authorities to forbid the loading of the container. Is this ‘summary declaration’ really summary? Not very: in fact, it requires the filling-in of more than 29 boxes. And as it is a declaration for customs purposes, it conveys the full commitment of the declarant. But, in practice, who is the declarant for importation in the EU? Theoretically, it should be the shipper. But this is not manageable in practice, especially with gigantic container vessels with more than 20,000 boxes on board. As a result, it appears that frequently the carrier ends up, in practice, as the declarant.¹⁰

7.1.2 *The moment when the customs debt is incurred*

Both importation of goods to, and their exportation from, the European Union may give rise to a customs debt. According to Art. 4 § 9 of the Community Customs Code, “Customs debt” means the obligation on a person to pay the amount

⁶ C. Schmitthoff, *The Export Trade: The Law and Practice of International Trade* (11th edn, Sweet & Maxwell, 2007), p. 642.

⁷ See Regulation 648/2005 (EC) and Regulation 1875/2006 (EC).

⁸ Art. 36 a § 2.

⁹ Art. 36 a § 3.

¹⁰ See M. Cornette, ‘La responsabilité du chargeur dans ses relations avec les douanes. Le point de vue belge’, DMF 2008, no 689.

of the import duties (customs debt on importation) or export duties (customs debt on exportation) which apply to specific goods under the Community provisions in force'. More specifically, some provisions define the precise events giving rise to a customs debt. For exports from the EU, things run smoothly. Article 209 §1 thus states that 'a customs debt on exportation shall be incurred through the exportation from the customs territory of the Community, under cover of a customs declaration, of goods liable to export duties'. The identification of the debtor creates no difficulty, as 'The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the declaration is made shall also be a debtor' (Art. 209 § 3). And, frequently, for export, the shipper or its agents are the declarants.

By contrast, the import of goods into the EU shifts the burden of the customs debt onto the shoulders of the carrier. Indeed, according to Art. 202 § 1 of the Community Customs Code, 'A customs debt on importation shall be incurred through: (a) the unlawful introduction into the customs territory of the Community of goods liable to import duties, or (b) the unlawful introduction into another part of that territory of such goods located in a free zone or free warehouse.' In practice, the shipping company, performing the contract of carriage, is the person who introduces the goods stuffed in the container into the customs territory of the EU. And the problem is that the concept of 'unlawful introduction' of the goods is very broad. For instance, the European Court of Justice (ECJ) has decided that if the description of the goods in the declaration does not correspond to their true classification in the tariff, the resulting introduction is on this account unlawful.¹¹ Therefore, a carrier relying on information provided by the shipper is at legal risk if this information, deliberately or inadvertently, does not in fact reflect the nature of the goods. Not only will they be the declarant, but they may also be considered to have unlawfully introduced the goods in to the customs territory.

7.1.3 *The identification of debtors*

According to Art. 4 § 12 of the Community Customs Code, "Debtor" means any person liable for payment of a customs debt'. This abstract definition is specified in particular cases. For regular exportation out of the EU (Art. 209 § 3) and irregular importation into the EU customs territory (Art. 201 § 3), the debtor is the declarant. But for 'unlawful introduction into the customs territory', Art. 202 § 3 states:

the debtors shall be:

- the person who introduced such goods unlawfully;
- any persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful;

¹¹ *Ministerie van Financiën v Papismedov* (case C-195/03) [2005] ECR I-1667 (cigarettes misdeclared as kitchen utensils); see too *Veli Elshani v Hauptzollamt Linz* (case C-195/03) [2009] ECR I-2759.

- and any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully.

It will come as no surprise that in the case of unlawful introduction, the Community Customs Code opts for a comprehensive definition of the customs debtor: the unlawful introduction is a customs offence and customs law has to make sure that monies will be eventually collected.¹² Therefore, in case of unlawful introduction of goods through a container, the question is to know whether the carrier can be deemed to be the debtor. The answer is that the reference to ‘the person who introduced such goods unlawfully’ is an objective reference to whichever operator physically introduced the goods, without any consideration whether or not they acted in good faith.¹³ Therefore, even though a carrier may have entirely innocently introduced containerised goods under a discrepant declaration, they are still liable as the debtor.

7.2 Declarations and the burden of liability

Reliance on the declarations made by the shipper for the purposes of the carriage of containerised goods frequently gives rise to controversies about the respective liabilities of shipper and carrier. This occurs, first, in connection with shippers’ declarations relating to dangerous goods that then damage the vessel or other cargo aboard, and second, in connection with the shippers’ declarations of shippers about the nature, quantity and condition of the goods stuffed in a given container.

7.2.1 *Declarations in respect of dangerous goods*

The shipper’s duty to provide the carrier with adequate disclosure on dangerous goods arises from several sources. One general source can be found in carriage of goods by sea legislation and in the various underlying international conventions: for example, Art. IV § 6 of the Hague Rules and Art. 12 of the Hamburg Rules (not to mention Art. 32 of the Rotterdam Rules). Chapter VII of the SOLAS Convention is specifically devoted to dangerous goods and refers to the International Maritime Dangerous Goods Code, or IMDG Code, a document containing a large list of hazardous goods and which is frequently updated in order to adapt to the never-ending creativity of the chemical industry. All too frequently, hazardous chemicals are packed into drums on shrink-wrapped pallets, with these pallets being then stuffed into ordinary containers loaded on vessels.¹⁴ Depending on the information disclosed by the shipper, the stowage planner will locate the containers in a certain area, either at the outside of the stack of containers or, sometimes,

¹² See *Spedition Ulustrans v Finanzlandesdirektion für Oberösterreich* (Case C-414/02) [2004] ECR I-8633 at [25].

¹³ See *Hauptzollamt Hamburg-Stadt v Viluckas* (Case C-238/02) [2004] ECR I-2141 at [29].

¹⁴ J. Cavanah, ‘Dangerous goods liability in the age of containerization’, 37 Tul Mar LJ 147 (2013).

near a heated fuel bunker. This accidental vicinity may induce self-ignition and explosion, risking serious damage to the vessel and the rest of the cargo.

The root of the problem frequently is the total or partial lack of information reaching the carrier from the shipper. This poor information may be the consequence of lack of thoroughness in the preparation of mill test certificates and the like. In the *Acacongua* case,¹⁵ decided by the Court of Appeal, evidence was brought that a consignment of calcium hypochlorite (a substance listed in the IMDG Code) which exploded, damaging ship and cargo, was a rogue product with a lower threshold for thermal instability than usual: the carrier was held able to recover from the shipper. In two cases decided by US courts, carriers had again accepted cargoes of calcium hypochlorite; the carriers had received a minimal warning by the shipper about the nature of the goods, but no specific information about safe storage temperatures. The two courts reached different conclusions, one holding the carrier immune from liability for lack of adequate warning¹⁶ and the other holding the carrier liable, as they were aware of the goods loaded on board.¹⁷ Sometimes, the chemical that is loaded on board is not even in the IMDG Code list;¹⁸ nevertheless, this does not prevent it being regarded as dangerous, depending on its intrinsic qualities.¹⁹ In the American *Rickmers* case,²⁰ a solid chemical containing magnesium was packed into sacks and stuffed into containers. It was not listed in the IMDG Code, and the shippers provided the carrier with a vague safety data sheet alluding to ‘certain physiochemical properties’ of it. After a collision with another vessel, the whole cargo exploded. The district court decided that the shipper’s vague warning was nevertheless sufficient to provide Rickmer with a constructive knowledge of the danger of the goods.

7.2.2 *Declarations on the condition and quantity of goods*

In the course of container transport, once the container has been fully loaded and sealed, the shipper or their agent usually completes a set of two or three original bills of lading in respect of the consignment. Thereafter, these bills of lading are signed by an agent on behalf of the shipowner without any possible control of the accuracy of the information. They are generally qualified by clauses such as ‘said to weigh’, ‘said to contain’ or ‘shipper’s load and count’. Upon arrival, when the container is opened at the premises of the consignee, a discrepancy frequently appears between the data on the bill of lading and the actual goods in the container, giving rise to suspicions of short-shipment by the shipper to the detriment

15 *Compañía Sud Americana de Vapores SA v. Sinochem Tianjin Imp & Exp Corp (The Aconagua)* [2010] EWCA (Civ) 1403, [2011] 1 Lloyd’s Rep 683.

16 *M/V DG Harmony, In Re*, 533 F 3d 83; 2008 AMC 1848 (2008), remanded and aff’d in *M/V DG Harmony, In Re*, 408 F Appx 435; 2011 AMC 1812 (2011).

17 *Contship Containerlines Ltd v PPG Industries Inc*, 442 F 3d 74, 77; [2006] AMC 686, at 689.

18 For an example see the decision of the Belgian *Cour de cassation*, dated 21 January 2010; also the case of *MS Star Ikebana*, *Jurisprudence du port d’Anvers*, 2009, p. 351.

19 E. Vaneeckhout & B. Insel, ‘La responsabilité du chargeur’, DMF, 2013, no 749, esp. p. 599.

20 *M/V Rickmers Genoa Litigation, In Re*, 622 F Supp 2d 56, 60 (SDNY 2009); *M/V Rickmers Genoa Litigation, In Re*, 752 F Supp 2d 379, 382 (SDNY 2010).

of the consignee²¹ or, sometimes, fraud by the consignee to the detriment of the carrier.²²

The question arises whether the carrier can avail themselves of the ‘said to contain’ clause so as to escape liability to the consignee. Or are they bound by the declarations derived from the shipper’s information and appearing on the bill of lading signed by them? In common law systems, effect is frequently given to such clauses: the presumption which would otherwise arise that the carrier has received the goods in number and condition described in the bill of lading is neutralised by them.²³ By contrast, in civil law systems, a strong hostility towards ‘said to contain’ clauses long prevailed, on the grounds that these standard clauses (*‘clauses de style’*) were imposed on the consignee and were to be considered as disguised non-liability or escape clauses, in violation of the Hague Rules.²⁴ This analysis has lost its influence, both for legal and practical reasons. First, the bill of lading could establish a presumption that the carrier had received the goods as long as its issue was the result of a bilateral process: declaration and draft by the shipper, followed by possible verification and signature by the shipowner. Now, however, the issue of a bill of lading is practically the result of the unilateral declaration by the shipper. Second, under general civil law, ‘said to contain’ clauses are regarded as good on the basis that they are admissible clauses governing the burden of proof and the admissible evidence.²⁵ A suggested methodology to bring evidence is to compare the various declarations and documents: the mill certificate, packing list, summary export declaration, summary import declaration, bill of lading and the sale of goods contract itself.²⁶

A distinct issue is the value of the lien of the carrier over the containerised goods. Frequently, bills of lading issued to cover a containerised cargo stipulate a lien on the goods for freight and general average contributions.²⁷ Yet, in case of short-shipment or in case of fraud by the shipper, the lien may well be illusory.

21 See *Versailles*, ch 12, 7 October 2014, DMF, 2015, no 765, note J. Lecat.

22 See *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm).

23 See the Australian decision in *Ace Importers Pty Ltd v Companhia de Navegação Lloyd Brasileiro (The Esmeralda I)* (1987) 10 NSWLR 32; [1988] 1 Lloyd’s Rep 206; also W. Tetley, ‘The Burden and order of proof in marine cargo claims’, 2004, Conference delivered at the Canadian Maritime Law Association.

24 See *Cass. Comm.*, 29 January 1980 (*American Legacy*), JCP 1980, II, 19338 (R. Rodière).

25 O. Cachard, ‘Le trafic conteneurisé et la clause *said to contain*’, DMF, 2013, no 749, pp. 612–619.

26 O. Cachard, ‘La clause *said to contain*. De la pratique à la théorie (et non l’inverse . . .)’, *Gazette de la chambre arbitrale maritime de Paris*, no 37, Spring 2015, pp. 2–3.

27 A typical clause: ‘The carrier, its servants or agents shall have a lien on the goods and any document relating thereto for freight and for general average contributions to whomsoever due. The carrier, its servants or agents shall also have a lien against the merchant on the goods and any document relating thereto for all sums due from the merchant to the carrier under any other contract. The Carrier may exercise its lien at any time and any place in its sole discretion, through the action of any servant, agent or Subcontractor, whether the contractual carriage is completed or not. The Carrier’s lien shall also extend to cover the cost and legal expense of recovering any sums due. The Carrier shall have the right to sell any Goods liened by public auction or private treaty, without notice to the Merchant. Nothing herein shall prevent the Carrier from recovering from the Merchant the difference between the amount due to the Carrier and the net amount realised by such sale.’

7.3 Declarations and the burden of the financial risk

When a FCL cargo has been stuffed under the exclusive control of the shipper, the declarations of the shipper have to be relied upon for the purposes of documentary credits and of insurance, both mechanisms for transferring financial risks. For documentary credit operations, it was accepted practice to counterbalance the declarations of shipper by claused bills of lading, which maintain banks and carriers immune from risk. For insurance purposes, the strict regime of the utmost good faith is supposed to protect insurers against non-disclosures and misrepresentations.

7.3.1 *Declarations and the burden of risk on banks*

Although banks issuing documentary credits deal with documents and are concerned in theory neither with the goods themselves nor with the underlying contract, the discrepancy between the declarations on a bill of lading and the actual content of the container could have created problems. On the level of substance, one could argue quite plausibly that a bill of lading with a ‘said to contain’ clause did not provide adequate security; on the level of form, one might have said that banks could reject such a bill as a claused bill, on the basis that Art. 27 of UCP 600 normally requires clean transport documents. In fact, however, UCP 600 clearly allows the submission of bills of lading thus claused. Article 26(b) states: ‘A transport document bearing a clause such as “shipper’s load and count” and “said by shipper to contain” is acceptable’. This is hardly changed from UCP 400 and UCP 500.²⁸ The ICC had solicited comments on this point, but received none, confirming that the provision worked well in practice. Article 26(b) means that the bank vested with the duty to check documentary compliance is not in breach of its duty when it accepts a claused bill of lading of this kind, and bears no special risk honouring a letter of credit upon presentation of it. As a consequence, export of containerised goods may be easily financed through the usual channels of documentary credit. This possibility of financing even modest value consignments is frequently used in practice, as evidenced by case law.²⁹

7.3.2 *Declarations and the burden of risk on insurers*

The costs of marine insurance covering an export transaction are borne either by the buyer or the seller, depending on the applicable Incoterm. For containerised goods that will probably undergo multimodal transportation, the terms of the first group³⁰ are recommended. If goods are sold FCA, the buyer pays for insurance; if CIP, the seller agrees to obtain at their own expense cargo insurance complying

²⁸ ICC, *Commentary on UCP 600, Article by Article Analysis by the UCP 600 Drafting Group*, Paris, 2007, ICC Publication no 680, pp. 125–126.

²⁹ For an example of litigation concerning a containerized cargo of shredded steel scraps, financed through five letters of credit, see the English decision in *Fortis Bank SA v Indian Overseas Bank* [2011] EWHC 538 (Comm), [2011] 2 Lloyd’s Rep 190.

³⁰ That is, EXW, FCA, CPT, CIP, DAP, DAT and DDP.

with the minimum cover provided with clause C of the *Institute Cargo Clauses*. In both cases, the insurer will receive information originally coming from the exporter. For goods belonging to ordinary species of lawful merchandise, the exporter need only disclose fairly basic details of the insured risk, whereas they have a duty of full disclosure when the goods are of an unusual or particularly dangerous kind.³¹

When shortages or damage become apparent on arrival at the buyer's premises, there will be a discrepancy between the actual present state of the goods and the initial state of the goods referred to in the declaration. This discrepancy may simply reflect the realisation of some transport risk: the goods were damaged or stolen during carriage. But the discrepancy may also well be the result of fraud on the part of the seller or consignee. This will be obviously the case when a valueless cargo has been stuffed in the container instead of the contractual cargo. Things are more complex in the situation of short-shipment of containerised goods, when part of the cargo is missing. The probability of fraud by the shipper is no doubt higher when the goods are sold FOB or EXW, since in such a case the fraudulent shipper does not have to pay to insure non-existent goods. But a FOB or EXW containerised cargo might as well have been stolen.

Under both English and French law,³² the issue of fraudulent declaration is crucial. It is well known that the contract of marine insurance is based upon the utmost good faith. For containerised goods, non-disclosure of relevant elements will have to be established afterwards, by confronting different types of evidence: discrepancies between all types of documents related to the operation (mill tests, customs documentation, the bill of lading, the contract, etc.), and other expert evidence, for example as to whether a sealed container might nevertheless have been opened.³³

7.4 Conclusion

Container transport now represents the essential part of the liner transportation activity and therefore a substantial part of documentary credit and cargo insurance underwriting; as for customs and safety, the volume of transactions is so significant that new rules have been adopted in the EU and in the US. Nevertheless, it seems that the impact of containers has been dealt with separately in each ring of the chain. This has produced a paradoxical shift of liability between operators.

31 C. Schmitthoff, *The Export Trade: The Law and Practice of International Trade* (11th edn, Sweet & Maxwell, 2007), p. 409.

32 Art. L113-8 and Art. L113-9 *Code des assurances* (France); Insurance Act 2015, Part 2 and Schedule 1 (England).

33 See the comments of the Deputy Judge in *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm) at [15]: 'After further investigation as to how the container could have been opened without breaking the seal, Mr Gossanou concluded that the riveted bolt which fixed the left hand handle of the right hand door to the locking mechanism had been cut, enabling the handle to be taken away from the lock and the door opened, providing access to the container without breaking the seal. The riveted bolt had been replaced with a rusty threaded bolt and nut. There was scratching of the surface of the door in way of where the bolt was located. Mr Gossanou was able to demonstrate how the container had been entered by unscrewing the bolt, taking the handle away from the lock without breaking the seal and rotating the lock with a crowbar to open the door.'

On the one hand, carriers have benefited from the admission of the effects of the 'said to contain' clause in their relation with shippers and consignees. This appears to be a voluntary *quid pro quo*, in exchange for reduced freight rates and faster liner transportation. Article 26(b) of UCP 600 tends to support the view that this balance is accepted by the whole trade community.

On the other hand, as far as safety is concerned, the regime applicable to carriers has grown stricter. For customs purposes, they may be held as Custom Debtor for the unlawful introduction of goods, on which they have little control. For maritime safety reasons, some courts require carriers to elaborate a constructive knowledge of dangerous cargo, even though the shipper has not complied with its own declarative duties.

Finally, as regards the balance of interests between the cargo interests and insurers, it seems that things are moving in the direction of insurers. Traditionally, from a legal point of view, insurers are protected by the rules sanctioning fraud, misrepresentation and non-disclosure. Now, from a practical point of view, insurers seem to be the best placed to track and identify what has occurred 'in the black box' between the premises of shipper and the premises of consignee: they can achieve this result through the collection of all declarations and documents, and through the operations of surveys.

Ultimately, container transport has grown cheaper and riskier for consignees. The way to predictability simply might be to accept paying an accredited control bureau to supervise the stuffing of containers.

CHAPTER 8

Letters of indemnity for delivery without a bill of lading

*Professor Richard Williams**

8.1 General principles

A letter of indemnity is an enforceable promise made by A to B to hold B harmless against any liability, loss or damage that B may incur as a result of complying with a request made by A, i.e. '*If you (B) do what I (A) ask, I (A) will hold you (B) harmless against any loss, liability or damage that you (B) may incur as a result of doing what I (A) ask.*' Therefore, most letters of indemnity comprise two components:

- A request by one party to another to perform a service; and
- A promise by the requestor to hold the party complying with the request harmless against any loss, damage or liability that he may incur as a result of complying with the request.

In many cases, the contract of carriage will itself provide for an express indemnity. For example most charterparties have clauses such as the following:

The Master shall be under the orders of the Charterers as regards employment, agency, or other arrangements. The Charterers shall indemnify the Owners against all consequences or liabilities arising from the Master, officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel's papers or for overcarrying goods.¹

Furthermore, even if the charter does not provide expressly for an indemnity, the common law will normally imply such a right in order to give effect to the dual components of the 'request and promise' arrangement described above. For example, the Court of Appeal in *Strathlorne Steamship v Andrew Weir*² approved the following principle that was laid down by Tindal CJ in *Toplis v Grave*:³

. . . when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and bona fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.

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1 Clause 9 of Baltime 1939 (revised 2001).

2 (1934) 50 Lloyd's Rep 185, at 193.

3 (1839) 5 Bing NC 636.

However, the mere fact that the shipowner has the right to be indemnified should they comply with the charterer's request does not mean that the shipowner is necessarily bound to do so. For example, A might ask B to perform some task that is not within the boundaries of the contract, such as an order to perform a voyage that is outside the agreed charter party geographical limits. Furthermore, it has been repeatedly held that a shipowner is not bound to comply with an order to deliver cargo to a party that is not entitled to receive it,⁴ or to deliver cargo to a party that may in fact have a right to receive it, if that party cannot produce the original bills of lading to verify such right.⁵

Furthermore, even if B were prepared to comply with A's request, B might be concerned that the charter party indemnity might not be sufficient to protect B against damage, loss or additional expenditure that B might incur as a result of complying with A's request. Alternatively, B might wish to increase the scope of the indemnity in consideration for their agreement to provide extra-contractual services. Therefore, free-standing collateral letters of indemnity are often used in order to persuade one party to comply with a request that is made by another party to perform some task that the party receiving the request is not normally obliged to perform under the contract.

Since letters of indemnity are comprised of the two fundamental components described above (i.e. a request and a promise to indemnify), they are very flexible instruments that are capable of use in many different circumstances. However, they are in practice used most often in the following circumstances:⁶

- Delivery of cargo without surrender of original bills of lading
- Change of destination/deviation
- Releasing clean or ante-dated bills of lading⁷
- Switch bills of lading
- Commingling of cargoes
- In lieu of the presentation of bills of lading under contracts for the sale of goods

Should the parties to a contract of carriage believe that a problematic situation is likely to occur during the currency of the contract (such as a request to deliver cargo without surrender of an original bill of lading), the parties may provide in advance for such an eventuality by including a mechanism in the contract of carriage itself that will trigger the use of such a letter of indemnity in such circumstances.⁸

Alternatively, parties will often agree to provide and accept extra-contractual (i.e. free-standing) letters of indemnity as and when needed.⁹ However, such letters

4 *The Sagona* [1984] 1 Lloyd's Rep 194 at 205, per Staughton J.

5 See, for example, *The Houda* [1994] 2 Lloyd's Rep. 541.

6 In more recent times letters of indemnity have also been used when shipowners are asked to slow steam in order to protect the shipowner against a possible claim that the ship has deviated.

7 However, such letters of indemnity can rarely be enforced for the reasons explained below.

8 This is common in the charter forms that have been produced by the oil majors; see, for example, clause 30.3 of the BPVOY4.

9 See, for example, the forms of letter of indemnity that have been jointly produced by the member clubs of the International Group of P&I Clubs.

of indemnity are themselves binding contracts *albeit* separate and collateral to the original contract. Therefore, the terms of such free-standing letter of indemnity may differ from the terms of the underlying contract, and their enforceability or otherwise is to be considered separately from that of the underlying contract.¹⁰

Letters of indemnity (whether they be an integral term of the contract of carriage or free-standing) normally perform a useful purpose in that they provide commercial flexibility. They enable the contract of carriage to be performed without delay whilst at the same time protecting the rights of the party that is being asked to perform the requested task and which may suffer damage or loss or liability as a result of performing the required task. Therefore, the common law usually recognises the benefits that letters of indemnity provide in such circumstances, and courts are normally ready to enforce their terms.

However, letters of indemnity are also often used in order to try to persuade a party to commit acts that are fraudulent or illegal. For example, most international contracts of sale will provide that payment is to be made against clean bills of lading¹¹ or bills of lading of a certain date.¹² Therefore, if the shipper were to produce clausured bills or bills which were differently dated, then they would not be able to obtain payment of the price from the buyers. In such circumstances, sellers of cargo sometimes request carriers to release clean bills of lading even though the cargo is clearly not in apparent good order and condition or to release ante-dated or wrongly dated bills of lading in order to deceive the buyer and obtain payment of the price in circumstances in which they should not be able to do so. Such requests are often accompanied by the offer of a letter of indemnity which is intended to protect the carriers were they to incur liability to the buyer as a result of releasing such improper bills. In such circumstances, the letter of indemnity is being used as a mechanism to persuade the carriers to fraudulently deceive the buyer, and if the carriers were to do so, they would be knowingly become part of the fraud. In such circumstances, courts are not normally prepared to enforce the terms of the letter of indemnity for public policy reasons, i.e. the courts are not prepared to encourage illegal acts and frauds.¹³

The same principle applies in all the various circumstances in which letters of indemnity are regularly provided. Therefore, a letter of indemnity that is provided to enable a ship to deliver cargo without production of a bill of lading in circumstances in which the shipowner is unaware that the party to whom they are asked to deliver is not the party that is, in fact, entitled to take delivery is likely to be

10 See *Laemthong International Lines Co Ltd v Artis* [2004] EWHC 2738 (Comm); [2005] 1 Lloyd's Rep 632.

11 Article 27 of UCP 600 defines a clean transport document as '...one bearing no clause or notation declaring a defective condition of the goods or their packaging'.

12 A contract to sell 'June goods' means that the bill of lading must be dated the 30 June at the very latest. Therefore, if the goods are not fully loaded until the 1 July, the bill of lading should also be dated 1 July, in which case the seller could not obtain the price from the buyer. In such circumstances, the shipper may try to persuade the carrier to release a bill of lading dated 30 June in order to deceive the buyer.

13 See *Brown Jenkinson v Percy Daulton* (1957) 2 Lloyd's Rep 557 and *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)* [2002] UKHL 43; [2003] 1 Lloyd's Rep 227.

enforceable,¹⁴ whereas it is not likely to be enforceable if the shipowner is being asked to deliver the cargo to someone that they know not to be the party that is entitled to take delivery.¹⁵

8.2 The law relating to the delivery of cargo without surrender of original bills of lading

Ever since 1794,¹⁶ a bill of lading has been treated by the common law not only as a contract of carriage but also as a document of title to the goods and a negotiable instrument.

Diplock LJ described its function in *Barclays Bank Ltd. v Customs and Excise* as follows:¹⁷

The contract for the carriage of goods by sea, which is evidenced by a bill of lading, is a combined contract of bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the shipowners. Such a contract is not discharged by performance until the shipowner has actually surrendered possession (that is, has divested himself of all powers to control any physical dealing in the goods) to the person entitled under the terms of the contract to obtain possession of them. So long as the contract is not discharged, the bill of lading in my view, remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred.

Accordingly, the right to take delivery of the cargo from the ship can be passed by the endorsement and delivery of the bill of lading by one person to another. However, since the carriers are not a party to the cargo sale contract, they have no knowledge of these endorsements. Therefore, they are not able to ascertain the identity of the party that is truly entitled to take delivery of the goods at any particular moment in time. Nevertheless, they retain the responsibility of ensuring that they deliver to that party, and this is a particularly heavy duty when the cargo in question is of very high value.

To assist the carrier to resolve this particular dilemma, the law has recognised the fact that the bill of lading is the best evidence of the right to take delivery of the goods and that possession of it is the best evidence of the holder's right to do so. Accordingly, the following rule has evolved in order to protect the carrier:

It is clear law that where a Bill of Lading or order is issued in respect of the contract of carriage by sea, the Shipowner is not bound to surrender possession of the goods to any person whether named as Consignee or not, except on production of the Bills of Lading.¹⁸ Until the Bill of Lading is produced to him, unless at any rate, its absence

¹⁴ This is usually the case when a request is made to deliver without bills of lading because the bills are still working through the letter of credit banking chain.

¹⁵ See the dicta of Tomlinson LJ in *The Jag Ravi* [2012] EWCA Civ 180; [2012] 1 Lloyd's Rep 637 at [50]–[53] and *Dugdale v Lovering* (1875) LR 10 CP 196.

¹⁶ *Lickbarrow v Mason* (1794) 5 TR 683.

¹⁷ [1963] 1 Lloyd's Rep at 88–89.

¹⁸ *The Stettin* (1889) 14 PD 142.

has been satisfactorily accounted for, he is entitled to retain possession of the goods and if he does part with possession he does so at his own risk if the person to whom he surrenders possession is not in fact entitled to the goods.¹⁹

Put very simply, production of the original negotiable bill of lading to the carriers is deemed to be sufficient proof to the carrier that they are entitled to deliver the cargo to that person. However, if the original negotiable bill of lading is not produced, then the carriers are taking the risk that they may be delivering the goods to the wrong party. The risk has been stated very simply as follows:

It is perfectly clear law that a Shipowner who delivers without production of the Bill of Lading does so at his peril.²⁰

Even if the party named as consignee in the bill of lading were to produce convincing proof of their identity, the carriers would still be taking a risk if they were to deliver the cargo to them without requiring them to surrender the original bill of lading, since the bill may well be made out ‘to the order of’ the consignee, which words should put the carriers on notice that the named consignee could have endorsed the bill in favour of another party during the transit.²¹

If carriers do deliver cargo without production of the bills of lading, they do so at their risk since such an act would be an interference with the rights of the party that is entitled to take possession of the cargo. Indeed, it would technically be a conversion of the cargo, as emphasised by Staughton J in *The Sagona*:

... the Owners are at the very least not bound to obey an order to receiver Y, if in fact it is receiver Z who is the Owner of the cargo and entitled to delivery of it. By doing so the Owners, and their master as joint tortfeasors, would be liable for the tort of conversion, whether or not they would also be liable to Z for breach of contract.²²

However, it is important to distinguish ‘discharge’ from ‘delivery’, since the law forbids delivery without surrender of the original bills of lading rather than the mere discharge of the goods without such surrender. Goods are discharged when they are taken from the ship and placed ashore. However, goods are not delivered unless and until the carrier ‘has divested himself of all power to compel any physical dealing in the goods, to the person entitled under the contract to obtain possession of them’.²³ In some circumstances, discharge and delivery may occur at the same

¹⁹ *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd’s Rep at 89, per Diplock, LJ.

²⁰ *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 2 Lloyd’s Rep at 120, per Lord Denning.

²¹ Even if the bill of lading is a straight bill, i.e. made out to X rather than ‘to the order of X’, the same risk applies since the carrier cannot be certain whether X has obtained the bill in good faith from the shipper. Therefore, it has been held that the same need to produce the original bill applies in the case of straight bills. See ‘*The Rafaela S*’ (2005) 1 Lloyd’s Rep 347.

²² [1984] 1 Lloyd’s Rep 194 at 198. It may be possible in such circumstances for the shipowner to seek recovery from the party that has actually obtained delivery of the cargo consistent with the shipowner’s right to sue as a bailee. (See the Australian case of *Mitsui OSK Lines v Jack Fair Ltd* (2015) Lloyd’s Law Reports Plus 55 at [69].)

²³ *The Jag Ravi* [2012] EWCA Civ 180; [2012] 1 Lloyd’s Rep 637 at [43], per Tomlison LJ.

time (as in the case of the discharge of a bulk cargo when delivery is taken directly from the ship's side), whereas in other instances, they may occur at different times (as in the case of a container ship when a container is discharged from the ship into the container receiving yard where it then waits until a truck is sent to take delivery of the container some days later). Consequently, the law does not prevent a carrier from discharging cargo into a shore storage area or warehouse, provided that the carrier continues to exercise control over the cargo in such location pending surrender of the bills of lading by the party demanding delivery.²⁴

The carrier may also be entitled to deliver cargo without demanding the surrender of the original bills of lading if the local law at the port of discharge requires delivery to be made, since this would be the only way in which the contract could be lawfully performed.²⁵

Similarly, such delivery could legitimately be made if there is a custom at the port of discharge to effect delivery without surrender of the original bills. However, a custom must be distinguished from a mere practice; a custom in its strict sense must be reasonable, certain, consistent with the contract, universally acquiesced in and not contrary to law.²⁶

Therefore, subject to such rare exceptions, the carrier who delivers cargo without surrender of the original bills of lading runs the risk of the substantial 'peril' that was envisaged by Lord Denning in the *Sze Hai Tong* case. Such a 'peril' can be stated succinctly as follows:

Carriers:

- may be liable for the full value of the cargo that has been wrongly delivered; and
- usually have no defence to a claim for such misdelivery;²⁷ and
- may have no right to limit their liability if they are deemed to have acted recklessly.

For these various reasons, all the various members of the International Group of P&I Clubs²⁸ have introduced a rule which emphasises that a member that delivers

24 Such a solution may appear beneficial to a carrier that is anxious to obtain a quick turnaround for their ship in order to meet a cancellation date under their next charter. However, such a solution depends on the availability of adequate storage facilities and the ability of the carrier to trust the person that is storing the cargo, since that person is in fact the carrier's servant for the purpose of effecting a valid delivery and any wrongdoing on the part of the agent is likely to place liability on the carrier as principal.

25 See *The Sormovskyi 3068* [1994] 2 Lloyd's Rep 266 at 275.

26 See *The Sormovskyi 3068* [1994] 2 Lloyd's Rep 266 at 275, and Section 8.4 below.

27 It has been recognised by the Court of Appeal that there is no reason why an appropriately worded bill of lading clause could protect a carrier in such circumstances (see the comments of Mance LJ in *Motis Exports v Dampskibsselskabet AF 1912 A/S (No 1)* [2000] 1 Lloyd's Rep 211 at 217; Tuckey LJ in *The MSC Amsterdam* [2007] EWCA Civ 794; [2007] 2 Lloyd's Rep 622 at [37]. See also the decision of the Privy Council in *The New York Star* [1980] 2 Lloyd's Rep 317; and of the Hong Kong Final Court of Appeal in *Carewins v Bright Fortune Shipping* [2009] 3 HKLRD 409). However, it has also been emphasised in such cases that the *contra proferentem* rule will be strictly applied and that there is a presumption that the wording of standard bill of lading exception clauses are not intended to give protection in such circumstances. Nevertheless, it was held by the Privy Council in *The New York Star* that the carriers were entitled to be protected by the following words: 'In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods . . . '.

28 The relevant clubs are the American Steamship Owners Mutual Protection and Indemnity Association Inc, Assuranceforeningen Gard, Gard P&I (Bermuda) Ltd, The Britannia Steam Ship

cargo other than against surrender of the original bill of lading does not have P&I cover for liabilities that result from such an act. Such clubs are obliged to adopt such a rule pursuant to the terms of their common reinsurance policy and the rule applies to ‘negotiable’, ‘transferable’ or ‘to order’ bills, and, in most cases, to straight bills.²⁹

However, such clubs have also recognised that despite the risks that may be run by their members in such circumstances, their members may often be obliged to do so for commercial reasons. Consequently, such clubs have attempted to assist their members by providing draft forms of letters of indemnity which the member may choose to adopt as an alternative safeguard in such circumstances.³⁰ However, the clubs have repeatedly re-emphasised in club circulars over the years that they are not, by doing so, waiving the rule described above.³¹ Therefore, even if the member chooses to deliver cargo without surrender of the original bills of lading against receipt of a letter of indemnity in the terms drafted by the relevant P&I clubs, the member will still lose their P&I cover for liabilities, costs and expenses arising as a result of such delivery. However, to assist their members, some clubs provide alternative insurance cover for such risks outside the P&I mutual insurance system by payment of additional premium if certain safeguards are implemented, including the use of a letter of indemnity in the Form A that has been drafted by the members of the International Group.³²

8.3 The role of letters of indemnity in relation to the delivery of cargo without surrender of original bills of lading

Should a carrier decide to rely on their right to refuse to give delivery unless original bills of lading are produced, then there will inevitably be delay at the discharge port. Clearly, if the carrier has the right to insist on production of the original bill of lading before they tender delivery, then a charterer or a cargo interest that calls upon the carrier to do so without production of the bill of lading cannot establish that such a refusal constitutes a breach of contract on the part of the carrier and cannot, therefore, claim damages for any losses suffered by them

Insurance Association Limited, The Japan Ship Owners’ Mutual Protection and Indemnity Association, The London Steam-Ship Owners Mutual Insurance Association Ltd, The North of England Protecting & Indemnity Association Ltd, The Ship Owners’ Mutual Protection & Indemnity Association (Luxembourg), The Standard Club Ltd, The Steamship Mutual Underwriting Association (Bermuda) Limited, Sveriges Angfartygs Forening/The Swedish Club, The United Kingdom Mutual Steam-Ship Assurance Association (Bermuda) Limited and The West of England Ship Owners Mutual Insurance Association (Luxembourg).

²⁹ See, for example, Rule 34.1 provisos i and ii of the Gard Club.

³⁰ The member clubs of the International Group have jointly produced standard letter of indemnity forms. There are three different letter of indemnity headed A (delivery of cargo without bills of lading), B (deviation under bills of lading) and C (where both situations exist). Each letter of indemnity is in two forms, e.g. A and AA. The single-letter form is intended to be given by one party without counter guarantee, whereas the double-letter letter of indemnity is intended to be counter-guaranteed by a bank.

³¹ See for example Gard Circular No 2/2001 at http://www.gard.no/ikbViewer/web/publications/content?p_document_id=4162728 (last checked on 31 December 2015).

³² See, for example, www.gard.no for the Comprehensive Carrier’s Liability Cover that is provided by the Gard P&I Club.

as a result of such refusal and delay. Indeed, the likelihood is that the carrier can claim against such parties for the delay to their vessel.

In the case of a time charter, the usual rule is that hire is payable continuously in advance unless the charterers can bring themselves clearly within an off-hire clause³³ or the charterers can prove that the delay resulted from a breach of contract on the part of the shipowner. It was held by the Court of Appeal in *The Houda*³³ that a refusal on the part of the shipowner to deliver cargo without presentation of original bills of lading was not a breach of contract in the absence of an express clause that obliged the shipowner to do so and that, accordingly, hire was payable in full during the period of delay. Furthermore, it is extremely unlikely that a time charter will include an off-hire clause which places the vessel off-hire in these circumstances. Accordingly, in the vast majority of cases, a vessel will remain on hire.

Carriers also appear to have similar rights if they are entitled to claim demurrage under a bill of lading or voyage charter. The usual rule in these circumstances is that laytime or demurrage will run continuously unless the delay is caused by the shipowner's default or the running of laytime or demurrage is prevented by a clearly worded exception clause.³⁴

This issue arose for consideration in the case of *The Sormovskyi 3068*,³⁵ and the court referred with approval to the old case of *Erichsen v Barkworth*³⁶ in which case the voyage charterers refused to pay demurrage to shipowners on the basis that the delay was caused by the master refusing to discharge the cargo without production of the bill of lading. The charterers were held liable and Clarke J made reference to the following judgment of Crompton J in *Erichsen v Barkworth*:³⁷

It is no excuse that the charterers had some dispute with the holders of the bill of lading. The shipowners has nothing to do with the persons whom the charterers have engaged to load the vessel. He has acted under the charter-party and taken the cargo on board; and the defendants are bound by their contract that they will be ready to discharge the ship, or that the persons having the bill of lading will do so. Admitting that the property in the goods was in another person, the master, by the bill of lading, is liable to the person in whom the property vests. He has a right to demand the bill of lading or an indemnity, for by signing the bill of lading he binds himself to deliver the goods to the person who has the property in them.

8.4 Are carriers obliged to accept a letter of indemnity if one is offered to them?

In the majority of cases, the identity of the party that is entitled to take delivery of the cargo is known notwithstanding the non-availability of the bills of lading, and, in order to avoid the cost of keeping the ship waiting until such bills are presented, that party is often prepared either directly or via the charter party chain

33 [1994] 2 Lloyd's Rep. 541.

34 See B. Eder (et al.), *Scrutton on Charterparties and Bills of Lading* (23rd ed), (Sweet & Maxwell, 2015), Article 15. Similar principles also apply when the carrier delays the ship by exercising a lien on the cargo for freight – see *The Boral Gas* [1988] 1 Lloyd's Rep 342.

35 [1994] 2 Lloyd's Rep 266 at 272.

36 (1858) 3 H&N 894.

37 [1994] 2 Lloyd's Rep 266 at 272.

to offer the shipowner a letter of indemnity in order to avoid delay to the ship. They are normally prepared to do so since delivery will be given to the party that is in fact entitled to receive the cargo and, consequently, they are unlikely to incur liability under the letter of indemnity. However, whilst it is frequently the case that a letter of indemnity is *offered* in lieu of a bill of lading, the traditional rule is that a shipowner is not *obliged* to deliver against such a letter of indemnity.

For example, whilst it was recognised in *The Sagona*³⁸ and later in *The Houda*³⁹ that there may be a practice in the oil cargo trade for cargoes to be delivered against a letter of indemnity, the existence of a practice does not normally affect legal rights and obligations unless the practice amounts to a custom. Customs are enforced by the court only when they are proved to be reasonable, certain, consistent with a contract, universally acquiesced in and not contrary to law. The plaintiffs originally pleaded in *The Sagona* that the practice amounted to a custom; however, this pleading was subsequently withdrawn and the plaintiff merely argued that there was a practice to do so. It appears from the judgment that this concession was probably correct in that, on the evidence as a whole, it was found to be a common but not universal practice in the carriage of oil cargo. In such circumstances, the practice was not 'universally acquiesced in' and could not, therefore, amount to a custom. It now seems that this principle is firmly fixed, since the Court of Appeal found in *The Houda* that the owner of a tanker was not obliged to deliver notwithstanding the fact that a letter of indemnity was offered.

8.5 The impact of charter party clauses

Although a shipowner may be entitled to additional remuneration for such delay in the form of hire or demurrage, such delay may also be prejudicial to a shipowner if the shipowner has already fixed the next employment of the ship. Such 'next' charter is likely to have a cancellation clause, and the shipowner may be loath to run the risk of losing its next fixture should the 'next' charterer decide to implement their right of cancellation. Therefore, depending on the circumstances, the shipowners and charterers may both wish to use the indemnity mechanism as a means of delivering the cargo without delaying the ship due to the unavailability of the bills of lading.

However, the question of whether the shipowner is bound to deliver against an indemnity, or merely has the right to do so, is a fundamental risk allocation issue. On the other hand, if the terms of the clause oblige the shipowner to deliver against an agreed form of indemnity, then the commercial risk falls on the shipowner since it has given up their right to refuse to deliver against such an indemnity and must accept the sufficiency of the indemnity, whatever its real value.

The answer to this fundamental issue depends very much on the wording of the particular charter clause.

38 [1984] 1 Lloyd's Rep 194 at 201.

39 [1994] 2 Lloyd's Rep 541 at 551.

As stated above, most charter parties provide a shipowner with either an express or implied right of indemnity should the shipowners comply with the charterers' employment orders, provided that '*such an act is not apparently illegal in itself, but is done honestly and bona fide in compliance with the (Charterers') directions. . .*'⁴⁰

However, it has also been emphasised that the mere fact that a shipowner has a *right* to an indemnity under a charter party, or to demand a letter of indemnity from another party, does not necessarily oblige the shipowner to deliver without production of a bill of lading if so required by the charterer. This distinction is very important since a shipowner may be very reluctant to rely upon an indemnity from a party of whose financial standing the shipowner is not convinced. This is particularly so given the fact that they will have lost their P&I cover if they deliver without production of the original bills of lading and face a claim which is potentially enormous.

The Court of Appeal emphasised in *The Houda*⁴¹ that the charterers were not entitled to demand that the carrier should deliver the cargo without presentation of the bills of lading merely because, *if* they agreed to do so, the charter party provided them with an indemnity. Millett LJ said:⁴²

In my judgment the solution to the problem which arises in the present case is not to be found in the implication of some contractual term, but on the general rule of the common law that, wherever one person acts on the instructions of another and thereby incurs personal liability or potential liability to a third party, that other cannot afterwards lawfully countermand his instructions: see for example *Chappell v. Bray* (1860) 6 H&N 145; *Read v. Anderson* (1984) 13 QBD 779 . . .

In the present case the Owners were contractually obliged to comply with the Charterers' instructions, and the Master was expressly required to sign Bills of Lading as the Charterers might direct. They directed him to sign negotiable Bills of Lading in favour of the Charterers or their order. This amounted to an instruction, not merely to sign Bills of Lading, but to deliver the cargo to the persons who provided evidence of their entitlement thereto by producing the Bills of Lading . . . By complying with the Charterers' instructions and signing and handing over Bills of Lading in negotiable form, the Master rendered the Owners potentially liable to any third party to whom the Bills of Lading might be negotiated. In the absence of express contractual provision entitling them to do so, it was, in my judgment, thereafter no longer open to the Charterers to countermand or vary their instructions by directing the Owners to deliver the cargo otherwise than against presentation of the Bills of Lading, thereby depriving the Owners of the protection to which their original instructions had entitled them.

However, although the shipowner is normally entitled to refuse to give delivery without production of bills of lading, they may be obliged to do so if the terms of the particular contract of carriage oblige them to do so. This was recognised by the Court of Appeal in *The Houda*, but the particular clause must be clearly worded if

⁴⁰ *Strathlorne v Andrew Weir* [1934] 50 Lloyd's Rep 185. See also *The Nogar Marin* [1988] 1 Lloyd's Rep 412 and *The Island Archon* [1994] 2 Lloyd's Rep 227.

⁴¹ [1994] 2 Lloyd's Rep 541 at 558.

⁴² [1994] 2 Lloyd's Rep 541 at 558–559.

it is to have this effect.⁴³ For example, although the relevant clause in *The Houda* stipulated that:

The master . . . shall be under the orders and directions of Charterers as regards employment of the vessel . . . and shall sign Bills of Lading as Charterers or their agents may direct

Charterers hereby indemnify Owners against all consequences or liabilities that may arise from the master . . . otherwise complying with Charterers' or their agents' orders, (including delivery of cargo without presentation of Bills of Lading. . . .)

it was recognised that this wording did not go so far as to oblige the shipowners to deliver without presentation of bills of lading. Neill LJ stated:

Clauses 13 and 50 do not in my view impose any express obligation on the Charterers to discharge a cargo in the absence of the Bill of Lading. They merely provide for a letter of indemnity if such discharge takes place. But I do not construe the clauses as imposing a contractual duty on the Owners.⁴⁴

By way of contrast, the charter party in *The Delfin*⁴⁵ provided that:

Should Bills of Lading not arrive at discharge port in time then Owners agree to release the entire cargo without presentation of the original Bills of Lading against delivery by Charterers of letters of indemnity issued in accordance with Owners' P and I Club wording, counter-signed by

The latter wording is clearly different in that it places a positive obligation on the part of the ship owners to release⁴⁶ the cargo without surrender of the original bills of lading notwithstanding the fact that the shipowner will lose much of his contractual defences and their P&I cover if they do so.⁴⁷ Therefore, Purchas LJ said:

In the event, Vanol elected, as they were entitled to do under the terms of the charterparty, to call upon the owners to deliver the cargo against an appropriate letter of indemnity.⁴⁸

The latter *Delfini*-type clause is now commonly found in the charter forms that are used by the oil majors.⁴⁹ Given the fact that the oil majors can normally be considered to be financially secure, a shipowner may be prepared to accept such an arrangement. However, the use of such clauses in charterparties that are fixed

43 [1994] 2 Lloyd's Rep 541 at 559.

44 [1994] 2 Lloyd's Rep 541 at 551.

45 [1990] 1 Lloyd's Rep 252.

46 The use of the word 'release' probably connotes a delivery of the cargo. However, as explained above, the use of the word 'discharge' does not necessarily connote 'delivery,' in which case a letter of indemnity that has been provided in order to 'discharge' the cargo without surrender of bills of lading may not protect a carrier against liability for a subsequent delivery of the cargo from shore without surrender of the original bills. See *The Bremen Max* [2008] EWHC 2755 (Comm); [2009] 1 Lloyd's Rep 81 and the comments of Tomlinson LJ at [43] of *The Jag Ravi* [2012] EWCA Civ 180; [2012] 1 Lloyd's Rep 637.

47 However, consistent with the principle that contractual provisions are not enforceable if they are used for fraudulent purposes, a shipowner is probably not obliged to deliver pursuant to such a clause if they were put on notice that they were being asked to deliver cargo to someone who was clearly not entitled to take delivery of it.

48 [1990] 2 Lloyd's Rep at 266.

49 See, for example, clause 30.3 of BPVOY4.

with charterers that are not oil majors and who may not therefore have the same financial strength may well involve a much higher level of risk.

8.6 Practical issues that affect the effectiveness of letters of indemnity

The effectiveness or otherwise of a letter of indemnity depends upon:

- (1) The legal enforceability of the letter of indemnity
- (2) The creditworthiness of the entity issuing the letter of indemnity
- (3) The legal capacity of the entity issuing the letter of indemnity
- (4) The beneficiary of the letter of indemnity
- (5) The terms of the letter of indemnity
- (6) The law and jurisdiction provisions of the letter of indemnity

8.6.1 The legal enforceability of the letter of indemnity

Comment has already been made above in relation to (A).

8.6.2 The creditworthiness of the entity issuing the letter of indemnity

The relevance of (B) is self-evident given the fact that the shipowners may have no P&I cover⁵⁰ for any liability that they may have incurred as a result of misdelivering cargo without obtaining the surrender of the original bills of lading.

The mere fact that the shipowners may agree to deliver the cargo without surrender of the original bills of lading against provision of a letter of indemnity will not protect them against liability to the party that was in fact entitled to take delivery of the cargo. That party is not a party to the letter of indemnity and is not bound by its terms, and can therefore sue the shipowners on the basis that the shipowners have wrongly and deliberately given their property away to third parties that had no entitlement to it. For the reasons explained in Section 8.2 above, the shipowners are unlikely to have a defence to such liability and will therefore need to rely on the provisions of the letter of indemnity by way of indemnity and need to be sure that the party that has provided the letter of indemnity is able to give a full indemnity.

It should be remembered in this regard that unless the terms of the relevant contract of carriage oblige the shipowners to deliver the cargo without surrender of the original bills of lading, they are not obliged to do so and can insist on their own terms as a condition of doing so. Therefore, the ship owners are not obliged in such circumstances to accept a letter of indemnity from their charterers, and should the shipowners not be satisfied that the charterers are able to hold them harmless against the substantial claim that may be made against them should they deliver the cargo to the party that is not entitled to receive it, they may prefer to insist

⁵⁰ Other than any additional insurance that the P&I Club may have provided on payment of additional premium.

on the provision of a letter of indemnity from a third party that they believe to be a more secure guarantor, as a condition of complying with the request to deliver without bills.

8.6.3 *The legal capacity of the entity issuing the letter of indemnity*

Issue (C) is also important in that letters of indemnity are usually given in order to protect a party against a liability that is potentially very large, and it is unlikely that the individual who has signed or otherwise provided the letter of indemnity will have sufficient assets to honour it personally. Therefore, it is important to establish that that person has the authority of the organisation on whose behalf he or she is purporting to sign the letter of indemnity, to bind that organisation to the terms of the letter of indemnity. If that person does not have actual or ostensible authority to bind the organisation, then the organisation may well not be bound by it and the person signing may be personally liable for breach of an agent's warranty of authority.⁵¹

Such an issue arose in the Australian case of *Pacific Carriers v BNP Paribas*⁵² in which case a bank refused to honour a letter of indemnity on the International Group Form A which had been countersigned by one of its officials on behalf of the party requesting delivery of cargo without surrender of the original bills of lading, on the grounds that internal bank regulations did not authorise that person to sign such a guarantee. However, the Australian High Court finally determined that despite the bank's internal regulations, the official had sufficient ostensible authority to bind the bank *vis-à-vis* third parties.

Similar difficulties also arose in the Hong Kong case of *Yang Ming v Shing Lee*⁵³ in which a guarantor refused to honour a letter of indemnity which had been signed by it on the grounds that it had signed the letter of indemnity merely as agent for a third party. The court finally determined that the guarantor was liable, as the beneficiary had not been made aware of the fact that the letter of indemnity had been signed for and on behalf of the third party. The court also held that if the agent does not disclose the fact that it is acting with authority for an undisclosed principal, the principal and agent may be both jointly and severally liable under the letter of indemnity.

8.6.4 *The beneficiary of the letter of indemnity*

The beneficiary of the letter of indemnity should logically be the party that will face the primary liability should the cargo be misdelivered to a party that is not entitled to receive it. In the majority of cases, that will be the shipowners, since they will normally be the party that will actually give delivery of the cargo. Therefore, even if the request to deliver the cargo is passed up the chain of charters to the shipowners, it is the shipowner that will be the party that will require to be

⁵¹ See *Rasnoimport v Guthrie* [1966] 1 Lloyd's Rep 1.

⁵² [2004] HCA 3; 78 ALJR 1045.

⁵³ (2009) HKCU 1184.

indemnified against liability to the party that was in fact entitled to take delivery of the cargo. Consequently, it follows that in the majority of cases, it will be the shipowner that should be the beneficiary of the letter of indemnity.

8.6.5 *The importance of the terms of the letter of indemnity*

It has been emphasised above that a letter of indemnity normally comprises two components:

- A request by one party to another to perform a service; and
- A promise by the requestor to hold the party complying with the request harmless against any loss, damage or liability that he may incur as a result of complying with the request.

Therefore, it follows that the promise to indemnify is conditional upon the beneficiary complying with the request, with the corollary that if that request is not executed, the promise to indemnify is nullified. This issue arose in the case of *The Bremen Max*⁵⁴ and involved the terms of a letter of indemnity on the original Form A that had been jointly drafted by the members of the International Group of P&I Clubs. The original Form A provided as follows (emphasis added):

The above cargo was shipped on the above ship by [insert name of shipper] and consigned to [insert name of consignee or party to whose order the bill of lading is made out, as appropriate] for delivery at the port of [insert name of discharge port stated in the bill of lading] but the bill of lading has not arrived *and we*, [insert name of party requesting delivery], *hereby request you to deliver the said cargo to [insert name of party to whom delivery is to be made]* at [insert place where delivery is to be made] without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.
2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

The beneficiary of the letter of indemnity was requested to deliver the cargo to (let us say 'X') but delivered mistakenly to 'Y'. Consequently, the provider of the letter of indemnity refused to either put up security to release the ship from arrest or to indemnify the beneficiary against any damages that were payable by them to the party that was in fact entitled to delivery of the cargo. The court agreed that the beneficiary was entitled to demand specific performance of the letter of indemnity only if they could prove that they had delivered the cargo to the party

⁵⁴ [2008] EWHC 2755 (Comm); [2009] 1 Lloyd's Rep 81.

named by the provider of the letter of indemnity in the initial paragraph quoted above.

Therefore, it is important to ensure that the beneficiary of the letter of indemnity should comply strictly with its terms. However, the clubs that are members of the International Group have appreciated that strict compliance may often prove to be difficult in practise, and, consequently, following the decision in *The Bremen Max* the wording of Form A was amended by adding additional words as follows:

The above cargo was shipped on the above ship by . . . and consigned to . . . for delivery at the port of . . . but the bill of lading has not arrived and we, . . . hereby request you to deliver the said cargo to ‘X’ [*name of the specific party*] or to such party as you believe to be or to represent X or to be acting for X at . . . without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows

To indemnify you. . .

Whilst shipowners will still need to undertake a programme of due diligence to ensure that they are delivering to the party identified by the provider of the letter of indemnity, the revised wording gives the shipowners some additional leeway in uncertain situations.

8.6.6 *The law and jurisdiction provisions of the letter of indemnity*

It has been emphasised above that a free-standing letter of indemnity is a contract that is separate from the underlying contract of carriage and, consequently, its effectiveness and enforceability is to be governed by law and jurisdiction clauses that may be different from those that apply to the underlying contract of carriage. The various forms of letter of indemnity that have been jointly drafted by the clubs that are members of the International Group provide for English law and jurisdiction, and this has proved to be beneficial to the beneficiaries of such letter of indemnity.

In the case of *The Laemthong Glory* (No. 2)⁵⁵ shipowners were asked by time charterers to deliver cargo without surrender of the original bills of lading. The shipowners agreed to do so in consideration of receipt from the time charterers of a letter of indemnity in Form A (letter of indemnity 1). The time charterers gave such letter of indemnity only after they had themselves received a letter of indemnity in similar terms from the party that was actually requesting delivery of the cargo (letter of indemnity 2). The shipowners proceeded to deliver the cargo without surrender of the original bills of lading and were subsequently held to have misdelivered the cargo and to be liable to the true owner of the cargo. Therefore, the shipowners sought to enforce letter of indemnity 1 but, by this time, the time charterers were found to be bankrupt.

⁵⁵ [2005] EWCA Civ 519; [2005] 2 All ER (Comm) 167; [2005] 1 Lloyd’s Rep 688. See also *The Jag Ravi* [2012] EWCA Civ 180; [2012] 1 Lloyd’s Rep 637.

The shipowners subsequently sought to enforce the terms of letter of indemnity 2 despite the fact that the shipowners were not a party to the contract contained in such letter of indemnity, and it was held by the English court that they were entitled to do so since Form A is subject to English law and, therefore, to the terms of the Contracts (Rights of Third Parties) Act 1999. This statute entitles a third party to enforce in their own name the terms of a contract that has been concluded in order to provide them with a benefit despite the fact that they are not a party to it. Section 1(1) of the Act provides that:

Subject to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if-

- (a) the contract provides that he may; or
- (b) subject to subsection (2), the term purports to confer a benefit on him.

The Court of Appeal recognised that letter of indemnity 2 was intended '*to indemnify (the time charterers), your servants and agents and to hold all of you harmless*' and that, for the purposes of delivering the cargo, the shipowners were in fact the agents of the time charterers. Therefore, since the contract contained in letter of indemnity 2 was intended to confer a benefit on the shipowners, the shipowners as a third party to that contract were entitled to enforce its terms despite the fact that the letter of indemnity had been provided to the time charterers and not to the shipowners.

8.7 For how long should a letter of indemnity be kept in force?

If cargo is delivered against a letter of indemnity, the party that has provided the security may either have to pay a bank or other guarantor a fee for providing the security or, at the very least, record that security in its accounts as a possible liability. Therefore, that party will normally wish to release that liability as quickly as possible. On the other hand, the carrier will wish to retain the security as long as possible in the event of future claims.

Letters of indemnity are intended to safeguard a carrier against liability. Therefore, in order to consider how long the letter of indemnity should remain in force, it is necessary to consider how long the carrier will remain vulnerable to a claim for possible misdelivery as a result of delivering cargo without requiring surrender of the original bills of lading. The answer to this question depends on the law that governs the particular bill of lading and/or the law that regulates delivery in the jurisdiction where the delivery took place. Under English law, the usual time limit for contract or tort claims is six years.⁵⁶ However, in the majority of cases, whether arising in the United Kingdom or in other countries, the relevant bills of lading will be subject to the Hague or the Hague-Visby Rules (or whatever version of the Rules that is applicable under the relevant local legislation) and which provide for

⁵⁶ Limitation Act 1980, s. 5.

a much shorter time limit of one year from delivery of the cargo. However, even if any particular version of the Rules applies in principle to misdelivery of cargo, it is by no means clear whether the time limit provisions of such Rules apply to claims for misdelivery.

The issue is complicated by the following factors:

1. do the provisions of the Hague and/or Hague-Visby Rules apply to all cases of misdelivery? And, if so,
2. which version of the Rules applies in the particular case since the time limit provisions of the Hague and Hague-Visby Rules are not necessarily the same?

8.7.1 Do the provisions of the Rules (whether Hague or Hague-Visby) apply to all cases of misdelivery?

Article 1(e) of the Rules (both Hague and Hague-Visby) provides as follows:

‘Carriage of goods’ covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

Furthermore, Article II of the Rules (both Hague and Hague-Visby) provides as follows:

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

Therefore, neither of the Rules refers expressly to the duty to deliver the goods, whilst both of the Rules provide that the Rules are to regulate the carrier’s duties simply ‘from tackle to tackle’.⁵⁷ These issues are relevant since, as stated above, cargo may, depending on the nature of the cargo, be either delivered directly from the ship as an integral part of discharge (as would normally be the case with bulk cargoes) or from a shore installation after discharge (as would normally be the case in the container trade).

8.7.2 Which version of the Rules applies in the particular case since the time limit provisions of the Hague and Hague-Visby Rules are not necessarily the same?

If the carriage is subject to the Hague Rules, Article III Rule 6 of those Rules provides that:

In any event, the Carrier and the Ship shall be discharged *from all liability in respect of loss or damage* unless it is brought within one year. . . .

⁵⁷ This restricted period of responsibility can be contrasted with that of the Hamburg Rules (article 4) and the Rotterdam Rules (articles 11–12) which provide that the carrier’s responsibility extends to delivery of the cargo.

In the case of *The New York Star*⁵⁸ the Privy Council considered the effect of contractual provisions that were similar to the Hague Rules and concluded that the time limit for a claim for wrongful delivery was one year. Similarly, it has been held by the Court of Appeal that the words ‘*in any event*’ are to be given a very wide construction. Tuckey LJ said in *The Happy Ranger* that:

However, I think the words ‘in any event’ mean what they say. They are unlimited in scope and I can see no reason for giving them anything other than their natural meaning.⁵⁹

However, *The New York Star* decision may not be conclusive since the Hague Rules were not incorporated *in toto*. By way of contrast, it was held by the Privy Council in *Sze Hai Tong Bank v Rambler Cycle Company Limited*⁶⁰ that the Hague Rules provisions did not apply to the failure of the carrier to effect a valid delivery after discharge. If this is so, then the relevant time limit under English law for claims subject to the Hague Rules may be six years rather than one year.

However, if the contract of carriage is subject to the Hague-Visby Rules, Article III Rule 6 of those Rules includes the following additional words:

... the carrier and the ship shall in any event *be discharged from all liability whatsoever in respect of the goods*, unless suit is brought within one year of their delivery or of the date when they should have been delivered.

In the case of *The Captain Gregos No. 1* Bingham LJ referred to the words underlined above and stated that:

I do not see how the draftsman could use more emphatic language

and

... the one year time bar was intended to apply to all claims arising out of the carriage (or miscarriage) of goods by sea under bills subject to the Hague-Visby Rules.⁶¹

Whilst the wording of Article III Rule 6 of the Hague-Visby Rules is clearly broader than the equivalent wording of the Hague Rules, it does not provide expressly that the relevant time limit under the Rules for misdelivery is one year. Furthermore, it is debatable whether Bingham LJ’s reference to ‘*carriage (or miscarriage) of goods*’ encompasses a misdelivery of cargo.

Therefore, there has been continuous debate in many countries for many years as to whether the Hague and/or Hague-Visby Rules regulate the delivery (or misdelivery) of cargo and, if so, whether the different wording of the Hague and Hague-Visby Rules provides for different time limits.⁶²

58 [1980] 2 Lloyd’s Rep 317.

59 *The Happy Ranger* [2002] EWCA Civ 694; [2002] 2 Lloyd’s Rep 357 at [38]. See also *The Kapitan Petko Voboda* [2003] EWCA Civ 451; [2003] 2 Lloyd’s Rep 1.

60 [1959] 2 Lloyd’s Rep 114.

61 [1990] 1 Lloyd’s Rep 310 at 315.

62 For a detailed analysis see W. Leung, ‘Misdelivery of Cargo Without Production of Original Bills of Lading: Applicability of the Mandatory Legal regime of Hague-Visby and the One Year Time Bar’

If there is a danger that the proper time limit is six years rather than one year, a carrier obviously runs a risk if they agree to release a letter of indemnity before that period expires, particularly since, as stated above, they will, in the meantime, have lost the benefit of their P&I cover. Nevertheless, they are likely to come under intense commercial pressure to release the letter of indemnity following the expiry of one year. However, even if the applicable time limit is one year rather than six years, the proceedings that protect the expiry of the time limit may, depending on the jurisdiction in which such proceedings are brought, be issued against the carrier within the one year but may not be brought to the attention of the carrier by service upon them for some months thereafter. Indeed, if the proceedings are *in rem* rather than *in personam*, the carrier may have no notice of the relevant proceedings until service is effected upon the ship (or a sister ship) when that ship trades next to that jurisdiction, which may be many years later.

In order to give the carrier some protection against such eventualities, the Form A letter of indemnity that has been drafted by the members of the International Group of P&I Clubs refrains from providing in favour of any particular time limit but requires the provider of the letter of indemnity to agree that:

As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.⁶³

8.8 The need for cargo claimants to become holders of the original bills of lading even after delivery has been effected against provision of a letter of indemnity

In view of the provision of the Form A letter of indemnity that has just been quoted, there would seem to be good reason why a receiver that has obtained delivery of the cargo by provision of a letter of indemnity rather than by surrender to the carrier of the original bills of lading, should wish, nevertheless, to secure possession of the bills thereafter in order to enable the receiver to surrender them to the carrier and, thereby, terminate the letter of indemnity. However, such a receiver may sometimes not bother to obtain delivery of the bills of lading from the party that was in fact the holder of them at the time of the delivery by the ship, even though such letter of indemnity may thereby remain in force and be a source of potential liability unless and until such bills are surrendered to the carrier. The receiver may fail to do so since it knows that it is in reality the party that is entitled to take delivery under the bills and may, therefore, consider it unlikely that it will ever be called upon to honour its obligations under the letter of indemnity. However, such a failure may be prejudicial to it should it wish to pursue a claim for any cargo loss or damage that has been incurred during the voyage. Although s. 2.2 of the

[2008] 39 *Journal of Maritime Law and Commerce* 205, at <http://www.jwllw.com/en/download/JMLC%20April%202008-MeliveryApplicabilityHVRules.pdf> (last checked on 31 December 2015).

⁶³ However, Form AA that is intended to be counter-secured by a bank provides for an initial period of six years but is automatically renewable from time to time for further periods of two years at the request of the beneficiary.

Carriage of Goods by Sea Act 1992 enables a cargo claimant that is not strictly a lawful holder of a bill of lading, but has obtained delivery of the cargo by provision of a letter of indemnity, to make a claim against the carrier under the bills of lading, such a right is subject to conditions.

Section 2.2 of the Act provides as follows:

Where, when a person *becomes the lawful holder of a bill of lading*, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill:

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill. . .

Section 5.2 of the Act defines a ‘*lawful holder*’ as either:

‘a person *with possession of the bill* who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates’;

or

‘a person *with possession of the bill* as a result of the completion, by delivery of the bill, of any indorsement of the bill or , in the case of a bearer bill, of any other transfer of the bill’;

that has, in either case,

‘become the holder of the bill in good faith.’

Therefore, in order to have the right to sue, the claimant must satisfy the following two requirements:

- i. it must have *become the holder of the bill* by virtue of a transaction that was effected in pursuance of any contractual or other arrangements that was made before the cargo was delivered; *and*
- ii. *it must have possession of the bill*⁶⁴

To have the right to bring a claim against the carrier, a claimant must ensure that it is a holder in good faith of a bearer bill of lading, or in the case of other forms of bill of lading, that it is a holder in good faith of a bill of lading that names the claimant as consignee, or is a holder in good faith of a bill of lading that has been validly endorsed in favour of the claimant.⁶⁵ In most cases, a claimant is able to satisfy these requirements only by ensuring that it obtains possession of the original bills of lading (duly endorsed if necessary) from the party that was the holder in good faith at the time that the cargo was delivered from the ship, or if there is a chain of cargo sales, that the bills have been properly endorsed and transferred along each link of the chain and finally delivered to the claimant. A failure to do so may well provide the defendant carrier with the right to contest the claimant’s right to sue.

⁶⁴ See *The David Agmashenebeli* [2002] EWHC 104 (Admlty); [2003] 1 Lloyd’s Rep 92, *The Ythan* [2005] EWHC 2399 (Comm); [2006] 1 Lloyd’s Rep 457, *The Pace* [2009] EWHC 1975 (Comm); [2010] 1 Lloyd’s Rep 183 and *The Erin Schulte* [2014] EWCA Civ 1382; [2015] 1 Lloyd’s Rep 97.

⁶⁵ See the decision of the Singapore High Court in *The Dolphina* [2011] SGHC 273; [2012] 1 Lloyd’s Rep 304.

8.9 Conclusion

A letter of indemnity is a very flexible and useful instrument that can benefit both the giver and the receiver of it. However, it is the experience of the author that such letters of indemnity are both given and taken without due consideration of the risks that may be involved in doing so. It is not ‘just a piece of paper’; it can just as easily as it can be a source of liability and litigation as it can a source of comfort. The commercial law encourages parties to help themselves and, therefore, encourages the responsible use of letters of indemnity to allow flexibility and render contracts less rigid in scope. However a failure to do so can be costly.

CHAPTER 9

The rising tide of paperless trade

Analysing the legal implications

*Dr M. A. Goldby**

9.1 Introduction

The bulk of the legal framework underlying international trade transactions derives from standards developed and adopted by private actors, often representative trade associations. These standards are regularly incorporated into contracts whereupon their interpretation and enforcement often requires the filling in of gaps which are not explicitly addressed by the standards as adopted by the drafters. As the means of performance of contracts relating to cross-border sale and carriage of goods evolve thanks to the proliferation of paperless ways of recording and communicating information, it becomes more and more important to understand fully both the nature of such standards and the processes whereby the matters upon which they are silent may be addressed.

In recent years the use of paperless methods of doing business has become ever more widespread, and in no other sector are these developments more evident than in cross-border sales of goods and ancillary services, particularly carriage of goods and trade finance.¹ This paper will focus on three specific developments which are significant from the point of view of transnational norm generation, namely the 2010 edition of Incoterms adopted by the ICC,² the introduction by BIMCO³ of an Electronic Bills of Lading Clause to be included in charterparty contracts, and the adoption by the ICC of Uniform Rules for Bank Payment Obligations (URBPO). Certain issues upon which these recently adopted standard terms are ambivalent or silent will then be analysed in order to reach conclusions on how they might be approached both by parties incorporating them into their contracts as well as by adjudicators who may be called upon to interpret and enforce them. The term ‘adjudicator’ is used here to refer to any person involved in the resolution of a dispute between contractual parties.

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1 See generally M. Goldby, *Electronic Documents in Maritime Trade: Law and Practice* (OUP, 2013).

2 The International Chamber of Commerce.

3 The Baltic and International Maritime Council.

9.2 Significant recent developments

9.2.1 Incoterms 2010

The ICC overhauled completely the manner in which electronic records and communications are addressed in the International Commercial Terms in its 2010 revision. Articles A1 and B1, second indents, of each Incoterm now ‘give electronic means of communication the same effect as paper communication, as long as the parties so agree or where customary’.⁴ The second indent of each Incoterm’s Article A1 (General Obligations of the Seller) provides as follows: ‘Any document referred to in A1–A10 may be an equivalent electronic record or procedure if agreed between the parties or customary.’ The wording of the second indent of each Incoterm’s Article B1 is identical, except that, of course, the reference is to Articles B1–B10 rather than A1–A10.

This formulation is intended to ‘[facilitate] the evolution of new electronic procedures throughout the lifetime of the Incoterms 2010 rules’;⁵ however, in maintaining flexibility, the drafting also leaves open a number of questions, as shown by the discussion below.

(a) ‘Equivalent electronic record or procedure’

The drafting here indicates that where an electronic record is tendered by the seller in place of a paper document, the buyer will be entitled to reject it if it is not ‘equivalent’ to the paper document referred to in the applicable Incoterm’s articles. This raises an interpretative gap which requires two questions to be answered: (i) what constitutes an equivalent electronic record? And (ii) does the particular record tendered pass the equivalence test? The ICC defines an electronic record or procedure as ‘[a] set of information constituted of one or more electronic messages and, where applicable, being functionally equivalent with the corresponding paper documents’.⁶ While this definition is unlikely to be viewed as binding by an adjudicator, it is likely to be considered persuasive and used in interpreting the Incoterms articles.⁷ Notwithstanding this, however, due to the wording of the articles themselves as well as of the definition, the adjudicator may be required to consider various issues in their application, e.g. whether a ‘procedure’ can ever be equivalent to a ‘document’, and whether a ‘record’ is necessarily constituted of ‘electronic messages’.⁸

4 International Chamber of Commerce (ICC), *Incoterms 2010: ICC Rules for the use of domestic and international trade terms* (ICC, 2010), p. 8.

5 Ibid.

6 Ibid, p. 11.

7 See *Crédit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm), [2002] 2 All ER (Comm) 427, at [60]–[64], where Steel J took into account a policy statement issued by the ICC Banking Commission explaining the phrase ‘marked as original’ in Art. 20(b) of the Uniform Customs and Practices for Documentary Credits 1993 (UCP 500).

8 On this question, see the UNCITRAL *Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998*, (United Nations, New York, 1999), available electronically at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed 27.08.2015) (hereinafter MLEC Guide 1999), [30]: ‘The notion of “data message” is not limited to communication but is also intended to encompass computer-generated records that are not intended for communication. Thus, the notion of “message” includes the notion of “record”’.

In light of this, it is submitted in answer to (i) that the electronic record tendered would have to be one with the ability to perform the same functions as (i.e. which is the functional equivalent⁹ of) the relevant paper document. The question might arise here whether ‘equivalent’ refers solely to the fact of functional equivalence or whether it means that the electronic record or process must have an equivalent effect to the relevant paper document under the law applicable to the transaction (i.e. that it must be recognised as an equivalent by the applicable law). This is a subtle but important difference, as an electronic record may be *capable* in practice of performing the same functions as a given paper document (e.g. a bill of lading) but may nonetheless not be *recognised* as the equivalent of that document under the applicable law. When deciding whether a buyer is obliged to accept a tender under a sale contract incorporating Incoterms, this issue may have to be addressed. The answer to (ii) would depend on the facts of the particular case and, unless the parties agree explicitly in advance what exactly would constitute an equivalent record for their purposes, would have to be determined by an adjudicator. This is therefore an interesting example of a gap that can be filled, either *ex ante* by the parties or *ex post* in the context of dispute resolution. The recent English case of *Glencore International AG v MSC Mediterranean Shipping Co SA*¹⁰ demonstrates that in the absence of express agreement, the question of whether an electronic alternative is equivalent to a paper document (in this case a delivery order) can be very difficult (and costly) to determine.

(b) ‘Or customary’

The word ‘customary’ is the word within this provision liable to cause most litigation, uncertainty and inconsistency in interpretation and application. The question as to whether the use of a particular electronic equivalent is ‘customary’ is a question of fact. Depending on the adjudicator, the evidence required to reach a conclusion that such use is customary will vary. Under English law, the question will arise whether the provision requires that the party alleging that use of the electronic equivalent is customary would be required formally to prove a custom, that is, a practice that is certain, notorious and reasonable and that is followed *opinio juris sive necessitatis*,¹¹ a formidable burden of proof,¹² or whether the test might be satisfied by a lower level of proof, for example by showing a course of dealing between

9 For an overview of the meaning of functional equivalence see MLEC Guide 1999, referred to above, [15]–[18]. ‘[T]he “functional equivalent approach” . . . is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques’ (Ibid., [16]).

10 [2015] EWHC 1989 (Comm), [2015] 2 Lloyd’s Rep 508. The case is understood (January 2016) to be under appeal.

11 See *Devonald v Rosser & Sons* [1906] 2 KB 728, at 743 (Farwell LJ); *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421, at 1438–1439 (Ungoed-Thomas J); *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856, at 874 (Slade LJ).

12 See the discussion in M. Goldby, ‘Enforceability of “Spontaneous Law” in England: Some evidence from recent Shipping Cases’, in L. Mistelis and M. Goldby, *The Role of Arbitration in Shipping Law* (OUP, 2016), Heading C.3.

the parties,¹³ or a widespread and widely acknowledged market practice that formed part of the contract's factual matrix.¹⁴ It is worth noting here that the word 'customary' appears also in other Incoterms articles, not just A1 and B1, and these articles have on occasion been in dispute in cases before the English courts.¹⁵ However, in none of these was there any explanation of what was required in order to prove that something was 'customary' for the purposes of Incoterms.

The question as to whether the use of a particular electronic equivalent is 'customary' being a question of fact, the conclusion reached by the adjudicator is likely to vary according to the circumstances of the case. To increase predictability, if either party is keen not to be required to use or accept electronic alternatives, it must ensure that this is explicitly provided in the contract of sale. If either party wishes only certain specific equivalents to be used, they must spell out which these are in the contract, and include a provision excluding all others, whether customarily used or not.¹⁶ Failing this, the decision whether the buyer is obliged to accept a tender of widely used electronic alternatives will need to be taken by an adjudicator, who will have to decide what 'customary' means as well as whether use of the particular electronic equivalent is customary.

9.2.2 *The BIMCO Electronic Bills of Lading clause for charterparties*

In 2014, BIMCO drafted and adopted an Electronic Bills of Lading clause for use in charterparties. The clause was drafted in response to 'increasing use of electronic documentation, particularly in the dry cargo sector where it is actively promoted by a number of major charterers',¹⁷ and published in a Special Circular.¹⁸ The drafting was effected by a group of major charterers and owners. Essential to this initiative by BIMCO was the recent consideration of commercially available electronic bills of lading systems and services by the International Group of P&I Clubs. Fear of liability slowed down the uptake of electronic

13 On implying a term on the basis of a course of dealing, see discussion in the recent case *Glencore International AG v MSC Mediterranean Shipping Co SA* [2015] EWHC 1989 (Comm), [2015] 2 Lloyd's Rep 508, at [26]–[29] (Smith J).

14 See Goldby, n. 12 above; also C. Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2013), p. 80.

15 A Westlaw search of English case law using the search terms 'incoterms' and 'customary' was undertaken on 25.10.2015 and returned 16 results. Incoterms articles containing the word 'customary' were at issue in the following: *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905, [2014] 1 Lloyd's Rep 1; *Geofizika DD v MMB International Ltd* [2009] EWHC 1675 (Comm), [2010] 1 Lloyd's Rep 458 (reversed by [2010] EWCA Civ 459, [2010] 2 Lloyd's Rep 1); *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep 653; and *SK Shipping Co Ltd v BB Energy (Asia) Pte Ltd* [2000] 1 All ER (Comm) 810.

16 See *Geofizika DD v MMB International Ltd* [2009] EWHC 1675 (Comm), [2010] 1 Lloyd's Rep 458, where, at [24], the court held, in reference to Incoterms 2000 Article A3 of Incoterm CIP on contracts of carriage and insurance, that '[t]erms will not be "usual" or a means of carriage "customary" if they provide for storage on deck when all parties agree that they should be carried under deck.' This decision was reversed on appeal on a different point (see [2010] EWCA Civ 459, [2010] 2 Lloyd's Rep 1).

17 BIMCO, *Electronic Bills of Lading Clause for Charterparties*, BIMCO Special Circular No. 3, 20 May 2014 (hereinafter Special Circular), p. 1.

18 Ibid.

systems by carriers for a long time,¹⁹ but P&I Clubs have recently agreed to cover the liability risks arising from the use of certain systems,²⁰ which has increased owners' willingness to come out of their comfort zone and begin to use these systems.

P&I Clubs now provide cover for typical P&I Club liabilities arising under any electronic bill of lading to the extent that these liabilities would also have arisen had a paper bill of lading been used. If the particular liability would *not* have arisen had a paper bill been used, the liability will still be covered by the Club, but only on a discretionary basis unless the electronic system used was one approved by the International Group of P&I Clubs.²¹ The liabilities which might remain uncovered if an unapproved system is used include those arising from a successful legal challenge to the system's ability to transfer rights over the goods as intended, or from the ineffective incorporation of the Hague or Hague-Visby Rules (which may not apply automatically where a paper bill of lading is not used).²²

Accordingly, under the standard clause, shipowners are only obliged to subscribe to and use such systems as directed by the charterers, provided those systems are 'approved by the International Group of P&I Clubs'. The clause is a welcome development in that it could do much to facilitate more widespread acceptance and use of electronic alternatives in the shipping community, but, being BIMCO's first foray into this territory, it is useful to bear in mind that, inevitably, the drafting leaves certain questions unanswered.

The BIMCO Electronic Bills of Lading clause for charterparties provides as follows:

- a) At the Charterers' option bills of lading, waybills and delivery orders referred to in this Charter Party shall be issued, signed and transmitted in electronic form with the same effect as their paper equivalent.
- b) For the purposes of Sub-clause (a) the Owners shall subscribe to and use Electronic (Paperless) Trading Systems as directed by the Charterers, provided such systems are approved by the International Group of P&I Clubs. Any fees incurred in subscribing to or for using such systems shall be for the Charterers' account.
- c) The Charterers agree to hold the Owners harmless in respect of any additional liability arising from the use of the systems referred to in Sub-clause (b), to the extent that such liability does not arise from Owners' negligence.

The most interesting features of the clause are discussed below.

19 See discussion in M. Goldby, 'Electronic Bills of Lading and Central Registries: What is Holding Back Progress?' (2008) 17 *Information & Communications Technology Law* 125, pp. 137–140.

20 See UK P&I Club Circular Ref. 6/13, *Electronic (Paperless) trading systems – Electronic Shipping Solutions & Bolero International Ltd. – Updated ESS DSUA Version 2013.1*, March 2013, available electronically from <http://www.ukpandi.com/> (accessed 27.08.2015).

21 See UK P&I Club, *Paperless Trading (Electronic Bills of Lading) – Frequently Asked Questions*, available electronically from <http://www.ukpandi.com/> (accessed 27.08.2015), Question 2.

22 *Ibid.*, Question 5. See also discussion in M. Goldby, *Electronic Documents in Maritime Trade: Law and Practice* (OUP, 2013), [6.14]–[6.18].

(a) 'Bills of lading, waybills and delivery orders'

It is interesting that the BIMCO standard clause retains traditional terminology for transport documentation, which does not take into account that as electronic alternatives develop, they may evolve into instruments that achieve the same result as the paper documents without actually being bills of lading, waybills or delivery orders. This may be contrasted with the approach of the Rotterdam Rules, which have embraced a neutral approach referring to the means of determining who has the right of control over the goods.²³ This indicates that the industry has not yet passed to a new conceptualisation of how the results achieved by paper documents can be alternatively achieved by electronic records and communications,²⁴ a reflection of the fact that the transition to paperless trade is gradual and currently still incomplete. In this regard it is worth noting the emphasis on the ability to replace an electronic bill with a paper one in the Special Circular²⁵ – an important part of the service in view of the requirements that may be applicable at the country of destination.

The question might arise in future whether this clause would apply to something that were not called a bill of lading but an 'electronic transport record'. Arguably, it could not do so without careful rewording at the time of formation of the contract or manipulation by the adjudicator (based perhaps on the references to 'same effect'²⁶ contained in the Special Circular).²⁷ This therefore is one aspect of the clause that is likely to give rise to discussion in the future.

(b) 'At Charterers' option'

This phrase indicates that the issue of bills of lading in electronic form is part of the service the owner (actual carrier) is agreeing to provide to the charterer.²⁸ The consequence of this is that the charterer must bear the cost if it wants this additional service. Hence, any fees incurred in subscribing to or for using such systems shall be for the Charterers' account. The Special Circular notes that currently services provided by BOLERO²⁹ and essDOCS (formerly known as Electronic

23 See *United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea* (New York, 2008) (the Rotterdam Rules), Arts. 50, 51; also discussion in M. Goldby, *Electronic Documents in Maritime Trade: Law and Practice* (OUP, 2013), [6.85]–[6.89]. For a discussion of the implications see G. Van der Ziel, 'The Legal Underpinning of E-Commerce in Maritime Transport by the UNCITRAL Draft Instrument on the Carriage of Goods by Sea' (2003) *CMIT Yearbook* 260; G. Van der Ziel, 'Delivery of the Goods, Rights of the Controlling Party, and Transfer of Rights', Chapter 10 in D. Rhidian Thomas (ed.), *A New Convention for the Carriage of Goods by Sea: The Rotterdam Rules – An Analysis of The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext, 2009).

24 Such a transition may, in contrast, be seen in the financial field: a payment using a debit card can achieve the same result as writing and transferring a cheque, but it is conceptually distinct.

25 Special Circular, p. 1.

26 *Ibid.*, p. 2.

27 For a recent example where the English Court undertook such a process, having been asked to decide whether a release note and an import PIN code issued under an electronic cargo release system constituted a delivery order, see *Glencore International AG v MSC Mediterranean Shipping Co SA* [2015] EWHC 1989 (Comm), [2015] 2 Lloyd's Rep 508.

28 Charterparty contracts, simply put, are contracts whereby the shipowner undertakes to carry out the legitimate orders of the charterer: *The Gregos* [1994] 1 WLR 1465.

29 Bill of Lading Electronic Registry Organisation. See <http://www.bolero.net> (accessed 25.10.2015).

Shipping Solutions or ESS),³⁰ the two commercial systems for electronic bills of lading recognised at the time by the International Group of P&I Clubs,³¹ are free for owners, but that this provision is included ‘in case fees or charges are introduced in the future’.³²

From a legal perspective, and as explained comprehensively elsewhere,³³ subscription by the owner to the system goes beyond the need to become a user, but is also necessary because of the fact that electronic alternatives to bills of lading are reliant on a private contractual framework to achieve the same effect at law as their paper counterparts, a private contractual framework based on novation and attornment.³⁴ The owner will therefore become a subscriber once, and if a fee is payable, it would be paying a single subscription fee to keep its user’s status active. As a user, it could use the system in respect of any one of its ships, each of which might be chartered to a different charterer. The question therefore arises how this provision would be applied in practice: presumably the owner’s subscription fee would have to be divided up among all the different charterers who would be liable to cover a proportion of the fee applicable for the period of the charter. As different charters may commence at different times and last for different periods, where this clause is included in a charterparty, it must be supplemented by some term (express or implied) establishing the exact amount or proportion to be paid by the charterer to the owner, or at the least, an indication of how such amount is to be calculated. If such a term were not expressly agreed, the adjudicator would have to determine the appropriate amount, if such amount were to be in dispute.

This therefore is another example of an issue upon which the clause is silent and which falls to be determined extraneously either by agreement at the time of formation of the contract or by an adjudicator in a subsequent dispute.

(c) ‘The Charterers agree to hold the Owners harmless in respect of any additional liability arising from the use of the systems referred to in Sub-clause (b)’

This part of the clause appears to be in line with the indemnity that charterers generally give owners.³⁵ The question arises, ‘additional’ to what? One must assume additional to the liability already covered by the P&I Club as explained above. The

30 See <http://www.essdocs.com/> (accessed 25.10.2015).

31 A third system has since been approved. This is e-title, provided by E-Title Authority Pte Ltd, approved by the International Group of P&I Clubs in October 2015. See UK P&I Club Circular 12/15 dated 22 October 2015, available electronically at http://www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/Circulars/2015/UK_Circular_12-15.pdf (accessed 20.12.2015).

32 Special Circular, p. 2.

33 See M. Goldby, *Electronic Documents in Maritime Trade: Law and Practice* (OUP, 2013), [6.02]–[6.44].

34 *Ibid.*, [6.21] – [6.25] and [6.34] – [6.35].

35 The shipowner receives a general indemnity from the charterer which covers losses suffered by it as a direct consequence of carrying out such orders, provided the loss was one which, on a fair reading of the charterparty, the shipowner could not be taken to have accepted: *The Island Archon* [1994] 2 Lloyd’s Rep 287. This indemnity, however, does not cover all losses that are the foreseeable consequence of complying with a legitimate order: *The Kisa* [2005] EWHC 177, [2005] 1 Lloyd’s Rep 432.

expression ‘arising from the use’ is very broad, but it does suggest that causation must be shown. It is interesting to note that this is viewed by the drafters as another ‘just in case’ provision; the Special Circular provides: ‘these “additional” liabilities are not readily identifiable as those involved in the use of electronic bills of lading have concluded that the use of such systems will not result in unanticipated liabilities arising’.³⁶ However, one should note that the UK P&I Club Circular 6 of 2013 provides otherwise:

Members should also be aware that participation in an electronic trading system may expose them to certain liabilities which are not of a traditional P&I nature. These may arise through shipowners or charterers who wish to participate in either the ESS or Bolero systems being required to be party to particular contractual arrangements under which they assume obligations necessary for the system to operate. Examples of such liabilities may be for breach of confidentiality undertakings or of obligations to maintain computer links. Members should be aware that, in so far as such risks are not of a traditional P&I nature, other insurance arrangements may be required.

Should such liabilities indeed arise, and to the extent that they do not arise from the owner’s negligence, the charterer would have to indemnify the owner for the attendant losses, as the word ‘any’ permits very little scope for interpretation of (and change in the allocation of risk provided by) this clause. Indeed, an adjudicator adopting a formalistic approach to contract interpretation would likely interpret the word ‘any’ to mean just that, leaving the charterer open to potentially unlimited liability arising from the owner’s use of any electronic bill of lading system or systems, particularly if the terms of use impose strict liability on the owner for breaches occurring without his fault.

However, the nature of the examples given in the extract from the UK P&I Club circular quoted above suggests that these would seem to be the type of liabilities in respect of which the owner would be better positioned than the charterer to introduce preventive measures and insure against liability. In view of this, it would not seem economically efficient for losses resulting from the owner’s liability to be borne by the charterer. The BIMCO position that this is only a ‘just in case’ provision and that there is nothing the parties really need to do about it may therefore be said to be counterproductive, in the sense that it does not encourage parties to consider these possibilities and manage these risks in advance. In spite of BIMCO’s position, therefore, parties would be well advised to consider this part of the clause at the time of negotiation and formation of the contract. It is submitted that while this part of the clause might have been an essential inclusion for the clause to be adopted by BIMCO in the first place, in a market favourable to charterers it is not unlikely that it would be omitted from the contract altogether.

³⁶ Special Circular, p. 2.

9.2.3 *The ICC Uniform Rules on Bank Payment Obligations (URBPO)*

The Bank Payment Obligation (BPO) is a new type of payment arrangement designed by SWIFT using Trade Services Utility (TSU), a matching engine. BPO refers to the obligation of buyer's bank to pay seller's bank following the occurrence of a certain event, namely a match report generated by Transaction Matching Application (TMA) such as TSU. The match is between data derived from the purchase order which is used to create an 'established baseline', and data derived from trade documents (invoice, transport document, insurance document etc.) submitted into the matching engine by the seller's bank. In contrast to a letter of credit scenario, documents flow directly from seller to buyer.

The BPO was designed to overcome some of the shortcomings of the letter of credit. As noted by SWIFT in 2013:

The Letter of Credit is acknowledged as a flexible and highly effective instrument of trade finance, however it is in some respects complex and cumbersome, highly process-intensive, prone to error and therefore unpopular among importers and exporters in most markets across the world.³⁷

While based on open account methods of payment, the BPO is designed to introduce a further level of assurance of payment in the form of a binding undertaking by the buyer's bank to pay the seller's bank. Because the undertaking is triggered by matching of data about the underlying sale transaction, BPO should achieve increased automation in the financial supply chain (as it relies on automated data matching rather than manual checking of documents) and increased credit availability (as it enhances visibility of underlying commercial transactions to banks).³⁸ As such, it 'brings to market an alternative means of satisfying the risk mitigation, financing, settlement and information management needs of banks and businesses engaged in trade . . .'.³⁹ The ICC collaborated with SWIFT to develop a set of uniform rules to govern the interaction and messaging between banks concerned. It imposes an open messaging standard to be used by TMAs, namely ISO 20022 Trade Services Management (TSMT) Messages.⁴⁰ This standard is also used for e-invoicing platforms and applications.

The URBPO do not cover the relationship between buyer and seller who must agree on terms of payment in their contract of sale. Neither do they cover the relationship between the banks and their respective customers. Therefore, buyer and seller must instruct their respective banks to establish relevant baselines, giving clear instructions as to data that requires matching. Additionally, banks must agree separately with customers the terms under which the buyer's bank is entitled to claim payment from the buyer and the seller is entitled to claim payment from the

³⁷ OPUS Educational Report, *Observations on the Evolution of Trade Finance and Introduction to the Bank Payment Obligation*, SWIFT, March 2013, p. 7.

³⁸ J. Hennes, *The ICC Guide to the Uniform Rules for Bank Payment Obligations* (ICC, 2013), p. 30.

³⁹ *Ibid.*, p. 23.

⁴⁰ This is obligatory – see URBPO, Art. 2(c)(i). Cf *Supplement to the Uniform Customs and Practices for Documentary Credits 2007* v1.1 (eUCP), Art. e4.

seller's bank.⁴¹ Indeed, a major difference from the letter of credit is that the payment obligation subsists as between involved banks: there is no promise by the buyer's bank to pay the seller. It is unclear to what extent the seller can rely on the BPO.⁴² Further, the URBPO do not provide the basis of determining whether a Data Match or Data Mismatch has occurred.⁴³ This points to the importance of the user agreement to which TMA use is subject, which is likely to determine this question.

Two interesting questions arise. First, what are the implications of using data rather than documents for the relationships among all relevant parties? And second, are these implications appropriately addressed by the applicable legal framework? In order to answer these questions, it is necessary first of all to make a preliminary observation, namely that an important basic principle underlying the UCP has been incorporated also into the URBPO framework. Article 6 of the URBPO follows closely the wording of Art. 4 of the UCP 600, which lays down the autonomy principle.⁴⁴ Similarly, Article 7 of the URBPO echoes Article 5 of the UCP 600, providing 'an Involved Bank deals with data and not with documents, or the goods, services or performances to which the data or documents may relate'. The difference of course is that an Involved Bank in an agreement governed by the URBPO does not deal with documents but with 'data sets'. Hennah explains:

When all of the underlying agreements between the buyer, seller and participating banks are formally in place, the exchange of data can begin. Purchase order data must be provided by both buyers and sellers to their respective banks in order that the Baseline can be established. Once the goods are shipped, physical documents are sent directly by the seller to the buyer. The relevant data elements that have been extracted from these documents are passed to the bank for matching.⁴⁵

Following on from this, with regard to the data sets received by the bank, URBPO Article 9(c) provides that 'an Involved Bank is required to ensure that any data submitted by it to a TMA accurately reflects the data it has received from a buyer

41 In this regard the ICC has recently issued ICC Commission on Banking, *ICC Guidelines for the Creation of BPO Customer Agreements*, August 2015, available electronically at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2015/ICC-Guidelines-for-the-Creation-of-BPO-Customer-Agreements/> (accessed 20.12.2015).

42 J. Hennah observes in *The ICC Guide to the Uniform Rules for Bank Payment Obligations* (ICC, 2013), p. 29, that 'The bank payment obligation allows buyers to provide key suppliers with an absolute assurance that they will be paid on time according to the agreed payment terms. This assurance of payment comes for the legal commitment of an Obligor Bank (or Banks) to pay on the due date, provided that the data submitted by the Recipient Bank (the Seller's Bank) is compliant with agreed terms.' This seems to suggest that the seller (or supplier) can rely on the BPO that applies as between banks. The question arises on what basis could it so rely? Under English law, depending on circumstances, the seller might be in a position to enforce the BPO under the Contracts (Rights of Third Parties) Act 1999.

43 URBPO, Art. 1(b).

44 See *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127; *Discount Records Ltd v Barclays Ltd* [1975] 1 WLR 315, at 320 (Megarry J); *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, at 169 (Lord Denning MR); *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] AC 168, at 183 (Lord Diplock).

45 J. Hennah, *The ICC Guide to the Uniform Rules for Bank Payment Obligations* (ICC, 2013), p. 141.

or seller of goods, services or performance in connection with an underlying trade transaction'. However, because the BPO system envisages that it is the seller who extracts the data set from the documents and sends it electronically to its bank for matching with the established baseline, there is of course the potential for both transcription errors and falsification of data by the seller. The Frequently Asked Questions promulgated by the ICC Commission on Banking, BPO Education Group, suggest that this is a risk which needs to be managed by the bank as part of the bank-customer relationship.⁴⁶ As between the two involved banks, liability for falsified data is excluded: URBPO Article 12 echoes UCP 600 Article 34, and provides that:

An Involved Bank does not assume any liability or responsibility for: (i) the source, accuracy, genuineness, falsification or legal effect of any data received from the buyer or seller; (ii) the documents, or the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance, to which such data relates; or (iii) the good faith or acts or omissions, solvency, performance or standing of the consignor, carrier, forwarder, consignee or insurer of the goods or any other person referred to in the data.

But the rules are silent on what the bank should do if it discovers that the seller has used inaccurate or false data in the context of a particular transaction. Of course, while documents remain in paper form the data is extracted manually by the bank's customer; however, as the documents from which the data is to be derived are gradually replaced by electronic alternatives, eventually electronic extraction of data to generate requisite data sets could become the norm. Indeed, it is already what happens when services such as essDOCs are used: the dataset is extracted electronically by the third party service provider and fed to the bank on behalf of the customer.⁴⁷

With electronic extraction of data, electronic authentication of the source of the data (for example by verifying the carrier's digital signature applied to electronic bill of lading data) will be possible, and the question will then arise whether a buyer's bank could refuse to honour its payment obligation on the basis of lack of

46 ICC Commission on Banking, BPO Education Group *Frequently Asked Questions – Banks*, Document number 470/1222, 12 July 2013, available electronically from [http://www.iccwbo.org/About-ICC/Policy-Commissions/Banking/Task-forces/Bank-Payment-Obligation-\(BPO\)/](http://www.iccwbo.org/About-ICC/Policy-Commissions/Banking/Task-forces/Bank-Payment-Obligation-(BPO)/) (accessed 25.10.2015) (hereinafter FAQs Banks): 'There is a risk that the supplier creates a data set that is different from the content of the actual documents. Will this not affect the uptake of the BPO? The integrity of both the buyer and seller/ supplier is obviously very important. The BPO aims at increasing efficiency. This is only possible if there is a certain level of trust between the seller and buyer as well as the respective banks. Each bank will follow their usual client selection, control and KYC processes and will have to ensure that the client will respect the contractual engagement and provides data extracted from the original documents only. The BPO was not designed to support transactions between two corporates (and banks) dealing with each other for the first time.'

47 'CargoDocs Bank Payment Obligation (BPO) functions as an out-of-the-box BPO solution for both Corporates and Banks. It enables Corporates to apply for BPO and to agree a baseline with their Banks, in addition to feeding the final commercial and transport data set with source data from original electronic documents, crucially holding electronic Bills of Lading in escrow until a BPO match is achieved.' See <http://www.essdocs.com/solutions/trade-finance/cargodocs-bank-payment-obligation> (accessed 25.10.2015).

authenticity,⁴⁸ in the absence of evidence of fraud.⁴⁹ If the same approach is taken to BPO contracts as is taken in the case of documentary credits, the *Montrod*⁵⁰ decision could constitute an obstacle.⁵¹ Therefore, while the disclaimer in Article 12 may protect the bank from liability if it pays out on the basis of inaccurate or false data, it does not answer the question of how the bank should proceed if security systems within the bank point to inauthentic data (i.e. data that comes from a source other than that from which it purports to come). On this point, the URBPO, like the UCP and eUCP, are silent, and this gap will have to be filled in by dispute resolvers should the issue ever arise, unless parties address it at the time of entering into the contract.

9.3 The gap-filling process: contractual parties

As intimated several times above, one way to address ambiguities and gaps in the standards set by these representative private international organisations is to agree explicitly in advance on how such ambiguities are to be resolved and how such gaps are to be filled. Indeed, the status of the standards discussed above as standards to be incorporated into contracts⁵² means that parties are in a position to negotiate and agree amendments, substitutions or additions. Thus, in an ideal world all outstanding issues would be hammered out in advance, leaving no scope for uncertainty as to how any potential dispute might be settled.

48 In relation to the eUCP (which, however, envisage the bank as being in receipt of the actual documents rather than a dataset derived from them), the following comments were made: '[I]n letter of credit practice, the level of authentication of paper documents is facial. . . . Authentication has a very different significance in eCommerce. Because of the possibility of greater levels of authentication than are feasible in the paper world and because of the unwillingness of participants to accept levels of risk that they normally accept for equivalent documents in the world of paper, there has been considerable attention in eCommerce to authentication of data. As a result, various levels of authentication have arisen, some tied to specific technology. . . . Depending on the context, the expectations of the users, and what is commercially reasonable, what constitutes a minimally acceptable level of authentication not only varies but is inevitably linked to specific technologies.' J. Byrne and D. Taylor, *ICC Guide to the eUCP: Understanding the Electronic Supplement to the UCP 500*, ICC Publication no 639 (ICC 2002), pp. 75–76.

49 Proof of fraud by the seller would presumably trigger the fraud exception. See *The American Accord* [1983] AC 168 and *Czarnikow-Rioda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890, at 914 (Rix J), but it might be that the fact that the seller is not a party to the BPO contract would make their fraud irrelevant.

50 *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 1 WLR 1975.

51 See *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 1 WLR 1975, at [58] (Potter LJ). Cf. *Beam Technology (Manufacturing) Pte Ltd v Standard Chartered Bank* [2003] SLR 597. See also L. Chin and Y. Wong, 'Autonomy – A Nullity Exception at Last?' [2004] *Lloyd's Maritime and Commercial Law Quarterly* 14.

52 Unlike previous editions of Incoterms, the 2010 edition is described by the ICC as 'Rules' rather than articulated usage. See discussion in J. Ramberg 'Incoterms 2010', 29 *Penn State International Law Review* 415, pp. 422–424 (2010). Cf. J. Coetzee, 'Incoterms 2010: Codified Mercantile Custom Or Standard Contract Terms?' (2012) 3 *Stellenbosch Law Review* 564, pp. 578–581. Similarly, unlike the UCP, the URBPO are also termed 'Rules'. This suggests that the ICC does not view them as the articulation of binding custom or usage but rather as standards to be incorporated into contracts. On the status of private standard formulations as customary law, see K. Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd edn, Kluwer, 2010), pp. 91–92, 137–138. Berger describes the ICC's Incoterms and UCP 600 as being among '[code-like] legal instruments which have been drafted by reputable international institutions . . . and which constitute an amalgamation of commercial competence and experience'. *Ibid.*, p. 285.

While the identification of issues that the standards might fail to address, as well as the negotiation to reach agreement on these issues, is likely to be a very time-consuming process, where the standards as promulgated carry serious uncertainties, the process may nonetheless be worthwhile. Furthermore, if contracting parties are able to agree such amendments, substitutions and additions as may be necessary, these will be available for use in future contracts of the type, not just contracts between the same two parties, but also between each individual party and other businesses with which they might contract on the same standard terms. This would give rise to what Kahan and Klausner refer to as ‘network benefits’,⁵³ i.e. the benefits that are realised when contemporaneous use is made of the same term by multiple actors in a particular commercial sector. Further, such amendments, substitutions and additions, once they come to the attention of BIMCO or the ICC, may lead to improvement and refinement of the current terms in order to introduce new ‘editions’ which, should said network benefits (characterised by widespread contemporaneous use) materialise, would reflect the business practices which would by then have become established.

It is submitted that some of the issues discussed under Heading B are of the sort that would benefit more from being discussed and agreed on by the parties explicitly at the time of formation of the contract. The prime examples are (i) specifying acceptable electronic alternatives for the purposes of ICC Incoterms Articles A1 and B1;⁵⁴ (ii) in the case of the BIMCO Electronic Bills of Lading clause, specifying particular liabilities to be borne by the shipowner where the shipowner is better able to obtain insurance cover for those liabilities and to adopt preventive measures;⁵⁵ and (iii) in the case of the URBPO, specifying rights and duties of involved banks in terms of authentication of data where such authentication is feasible and desirable in line with emerging practices.⁵⁶

9.4 The gap-filling process: adjudicators

9.4.1 *The options*

This part discusses situations where a contractual dispute arises which raises a question that cannot be answered by reference to existing applicable law or express contractual terms. In this case the selection of the gap-filling rule will involve either an *ex post* (or backward-looking) deliberation that aims to find the rule that obtains a fair result between the parties to the particular dispute or an *ex ante* (or forward-looking) examination of the contextual features of that particular type of transaction, and an assessment of what rule would be considered to achieve a desirable outcome by people in general entering into that type of transaction.⁵⁷ In other

⁵³ M. Kahan and M. Klausner, ‘Standardization and innovation in corporate contracting (or “The economics of boilerplate”)’ 83 *Virginia Law Review* 713, pp. 725–727 (1997).

⁵⁴ See discussion under Section 9.2.1(a) above.

⁵⁵ See discussion under Section 9.2.2(c) above.

⁵⁶ See discussion under Section 9.2.3 above.

⁵⁷ See D. Farber, ‘Economic Efficiency and the Ex Ante Perspective’, Chapter 2 in J. Kraus and S. Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (CUP, 2000), p. 54.

words, there are two possible bases for the selection of the rule: the adjudicator may apply the rule best able to fulfil the parties' reasonable expectations, objectively determined (for example by referring to the practice/usage/understanding of the particular sector/industry/market⁵⁸). Or the adjudicator may apply the rule that achieves the most economically efficient result,⁵⁹ having regard to future transactions of the same type. The moral and ethical question of how an adjudicator should decide has led to many lively theoretical debates.⁶⁰

If one were to focus specifically on the case at hand, the features of the kind of circumstances within which that adjudicator's choice must be made are as follows:

1. the gap to be filled is in commercial standards drafted by bodies representing parties on either side of the contractual divide;
2. the standards are incorporated into discrete contracts by parties interacting regularly in particular commercial networks and markets;
3. the gap-filler selected by the adjudicator will become at best a 'default rule', that is, even if it were to be considered as setting a legal precedent,⁶¹ if future commercial parties decide that it does not reflect their intentions, they can select a different rule to apply to their contract by using explicit words to that effect.

As indicated by point 2 above, the context within which the parties contracted consists of a community of commercial actors who 'speak the same language' and would therefore, objectively speaking, share common notions of what would constitute efficient solutions in the allocation of risks between them. The difficulty is that there is a risk that the adjudicator will select the 'wrong' gap-filling rule (i.e. one that allocates risks inefficiently). Were this to happen, a corollary of point 3 above is that it is only really the parties to the dispute who will be adversely affected, as parties to future contracts of the same type can by express provision

58 What Barnett refers to as the 'relevant community of discourse': see R. Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 *Virginia Law Review* 821, p. 829 (1992).

59 For the purposes of our discussion, this concept will be explained using Lord McLaren's words in *William Morton v Muir Bros*, 1907 SC 1211, at 1224: 'If the condition is such that every reasonable man on the one part would desire for his own protection to stipulate for the condition, and that no reasonable man on the other part would refuse to accede to it, then it is not unnatural that the condition should be taken for granted in all contracts of the class without the necessity of giving it formal expression.' This is in line with Farber's analysis: 'in contract law [judges] have based decisions on what they believe the parties to a contract would have intended if they had considered an issue in advance. [This concept] can be reformulated without too much difficulty in terms of economic efficiency.' See D. Farber, 'Economic Efficiency and the Ex Ante Perspective', Chapter 2 in J. Kraus and S. Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (CUP, 2000), p. 78.

60 For an overview see D. Farber, 'Economic Efficiency and the Ex Ante Perspective', Chapter 2 in J. Kraus and S. Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (CUP, 2000), pp. 57–64. See also R. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication', (1980) 8 *Hofstra Law Review* 487, and cf. R. Dworkin 'Why Efficiency? A Response to Professors Calabresi and Posner' (1980) 8 *Hofstra Law Review* 563, pp. 573–590.

61 See distinction between terms implied in law and terms implied in fact, discussed in A. Phang, 'The challenge of principled gap-filling: a study of implied terms in comparative context' [2014] *Journal of Business Law* 263, and H. Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *Current Legal Problems* 297.

disapply the default rule thus created by the adjudicator.⁶² Therefore it is submitted that the economic efficiency test should be used for the purposes of construction and gap-filling only subject to the reasonable expectations test being also satisfied, as it is only in this way that justice between the parties to the actual dispute can be assured.⁶³

It is worth examining how the English courts tend to proceed in these situations. They certainly have not explicitly come out in favour of implying terms based on the efficiency norm to fill contractual gaps (in line with the *ex ante* perspective),⁶⁴ and indeed any suggestion that the parties should be subjected to ‘. . . the individual judge’s own notions of what might have been the sensible solution to the parties’ conundrum’ would likely be dismissed out of hand.⁶⁵ However, the courts do regularly make reference to ‘commercial’ or ‘business’ common sense⁶⁶ when choosing between alternative contractual constructions⁶⁷ or filling gaps in commercial contracts. In certain cases, where the natural meaning of the contract’s language defies ‘commercial common sense’, they will also construe the language against its natural meaning.⁶⁸ It is arguable that ‘commercial common sense’ is a rough equivalent of economic efficiency, in the sense that the question of whether

62 But see C. Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2013), p. 158: ‘The existence of “default inertia” and the “status quo bias” amongst contracting parties suggests that the law should take some care over the design of its default rules, perhaps reflecting those the parties would choose since they will often be adopted by the parties, even if only inadvertently.’

63 See discussion in H. Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 *Current Legal Problems* 297, pp. 320–323. See also R. Barnett, ‘The Sound of Silence: Default Rules and Contractual Consent’, (1992) 78 *Virginia Law Review* 821, p. 880: “‘the parties’ subjective consent is most likely to be satisfied by a default rule that interprets manifested consent to reflect the commonsense or conventional expectations that likely are part of the tacit assumptions of particular parties. Where there is an unexpressed (and possibly nonconscious, but nonetheless genuine) tacit assumption shared by both parties, it almost invariably reflects the commonsense expectations of the relevant community.’

64 See C. Mitchell *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2013), p. 164: ‘Judges themselves appear to accord no overriding importance to either *ex ante* or *ex post* perspectives. Their reasoning usually contains a mix of both forward- and backward- looking approaches.’

65 See *Aston Hill Financial Inc v African Minerals Finance Ltd* [2013] EWCA Civ 416, at [24], per Aiken LJ: ‘. . . I would agree with the statements of Briggs J, in *Jackson v Dear* [2012] EWHC 2060 at [40] first, that “commercial common sense” is not to be elevated to an overriding criterion of construction and, secondly, that the parties should not be subjected to “. . . the individual judge’s own notions of what might have been the sensible solution to the parties’ conundrum”.’ See also discussion in H. Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 *Current Legal Problems* 297, pp. 306–313.

66 For recent examples see: *Cottonex Anstalt v Patriot Spinning Mills* [2014] EWHC 236 (Comm), [2014] 1 Lloyd’s Rep 615; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Aston Hill Financial Inc v African Minerals Finance Ltd* [2013] EWCA Civ 416; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101; *Re Sigma Finance Corp (In Administration)* [2009] UKSC 2, [2010] 1 All ER 571.

67 See Aikens LJ in *Aston Hill Financial Inc v African Minerals Finance Ltd* [2013] EWCA Civ 416, at [24]: ‘If there are two possible constructions of the document a court is entitled to prefer the construction which is more consistent with “business common sense,” if that can be ascertained.’

68 See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, at [15]–[16] and [21].

a particular construction makes business common sense is determined objectively⁶⁹ and courts will fill in gaps with the efficiency goal in mind,⁷⁰ albeit without making use of economics tools and techniques to work out what would constitute the most cost-efficient and wealth-maximising result. The courts have also sought to fulfil the parties' reasonable expectations, objectively determined.⁷¹ Such reasonable expectations will depend on the contract's commercial context,⁷² and require a consideration of the tacit assumptions that underlie the parties' agreement, that is, a consideration of how the pertinent performance obligations would be understood within the 'relevant community of discourse'.⁷³

Indeed, one might say that a consideration of the contract's commercial context is essential to a reliable identification by the court of the rule that *both* achieves economic efficiency in the allocation of risks *and* fulfils the parties' reasonable expectations.⁷⁴

9.4.2 *Filling in gaps: before or after?*

As has been seen, parties entering into a contract incorporating the terms discussed under Heading B above have two choices: either to specify with precision at the time of entering into the contract what these ambiguous terms mean for the purposes of the contract between them (ensuring that in case of a dispute the meaning will be clear and predetermined) or to rely on the adjudicator should any dispute arise, to tease out and articulate the industry or domain-specific meaning of and fill gaps in the terms when the need arises. The former approach entails heightened 'specification costs',⁷⁵ in the sense that the process of contract negotiation will be

69 See Aikens LJ in *Aston Hill Financial Inc v African Minerals Finance Ltd* [2013] EWCA Civ 416, at [24]: 'I would add, still less should the issue of construction be determined by what seems like "commercial common sense" from the point of view of one of the parties to the contract.'

70 See for example *JH Ritchie Ltd v Lloyd Ltd* [2007] UKHL 9, [2007] 1 WLR 670 at [14], following Lord McLaren in *William Morton & Co v Muir Bros & Co*, 1907 SC 1211, 1224; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, at [40]–[44]. See also the discussion in H. Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *Current Legal Problems* 297, pp. 320–321.

71 The seminal example is *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194, at 196. For a comprehensive discussion of this subject see C. Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2013).

72 C. Mitchell, 'Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law' (2003) 23 *Oxford Journal of Legal Studies* 639.

73 See R. Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 *Virginia Law Review* 821, pp. 875–897 (1992): 'The conventional understanding is evidence, perhaps the best and only evidence, of what parties with mutual subjective tacit intentions concerning a matter arising in a gap in the manifestation of consent actually agreed to.' *Ibid.*, 882. Where parties' subjective tacit assumptions differ, Barnett maintains that using conventionalist default rules, i.e. default rules that 'reflect the prevailing expectations in the community of which the rationally ignorant party is a member' (*Ibid.*, 887), is still justified by the consent theory. See also C. Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2013), pp. 33–36.

74 For an overview of theoretical discussion in this regard see C. Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2013), pp. 151–165.

75 J. Kraus and S. Walt, 'In Defense of the Incorporation Strategy', Chapter 6 in J. S. Kraus and S. D. Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (CUP, 2000), pp. 193, 194–200.

lengthier and costlier than it would otherwise be. The latter approach entails heightened ‘interpretation costs’,⁷⁶ particularly where the method and/or process of dispute resolution makes the determination of the industry or market understanding of how the gap should be filled challenging,⁷⁷ in view of, among other things, the adjudicator’s lack of familiarity with the particular business context.

In the case of the standards discussed under Heading B above, the need to be able to conclude deals speedily and efficiently, as well as the existence of dispute-resolution methods that refer disputes to industry experts,⁷⁸ leads one intuitively to suppose that the latter approach is likely to be favoured between the parties, at least in respect of most of the issues discussed therein. Because the drafting bodies (ICC and BIMCO) that developed all of these standard terms advocate dispute resolution outside the courts, using methods that involve industry expertise, it is argued that this choice is likely to be the more cost-effective of the two, as the likelihood is that interpretation costs will be lower than specification costs.

The ICC makes available a whole range of dispute-resolution services, including institutional arbitration, mediation, expert services (including proposal or appointment of experts and neutrals and administration of expert determination proceedings), Documentary Instruments Dispute Resolution Expertise (DOCDEX – discussed below) and Dispute Boards for the resolution of disputes that arise during the performance of contracts.

In relation to the BPO, the use of the ICC’s DOCDEX service is recommended.⁷⁹ The ICC website describes DOCDEX as follows:

Cases are decided by a panel of three impartial experts having experience in, and knowledge of, trade finance transactions. Said experts are selected from a list maintained by the ICC Banking Commission.⁸⁰ The experts’ decision is further scrutinized by the Technical Adviser to the ICC Banking Commission to ensure that it conforms to applicable ICC Banking Rules and/or international standard practice in trade finance.

DOCDEX Decisions are confidential⁸¹ and are rendered in English. They are only binding if all parties have provided their express agreement. A DOCDEX Decision is not an arbitral award.⁸²

⁷⁶ Ibid.

⁷⁷ L. Bernstein, *Trade Usage in the Courts: The Flawed Conceptual and Evidentiary basis of Article 2’s Incorporation Strategy* (Coase-Sandor Institute for Law & Economics Working Paper No. 669, 2014).

⁷⁸ On the importance of the adjudicator’s familiarity with the relevant community of discourse see R. Barnett, ‘The Sound of Silence: Default Rules and Contractual Consent’ (1992) 78 *Virginia Law Review* 821, pp. 907–908. See also discussion in C. R. Drahozal, ‘Commercial Norms, Commercial Codes and International Commercial Arbitration’, (2000) 33 *Vanderbilt Journal of Transnational Law* 79.

⁷⁹ See <http://www.iccwbo.org/products-and-services/arbitration-and-adr/docdex/> (accessed 03.08.2015).

⁸⁰ ‘The experts rendering DOCDEX Decisions are individually handpicked by the Centre after careful screening to check their qualifications and independence.’ Ibid.

⁸¹ ‘Anonymized DOCDEX Decisions are widely distributed enabling practitioners to avoid common errors leading to disputes, while at the same time preserving confidentiality. You can find the full text of DOCDEX decisions on DC-PRO Focus, ICC’s online subscription service for documentary credits.’ Ibid.

⁸² Ibid.

Similarly, BIMCO advocates dispute resolution outside the courts in its dispute-resolution clauses. The most recent of these is the BIMCO Dispute Resolution Clause 2015 which provides for English law as the applicable law and for disputes to be resolved by London Arbitration in accordance with London Maritime Arbitrators Association (LMAA) Terms.⁸³ Other clause options include the BIMCO Dispute Resolution Clause 2013 ‘US Law, New York Arbitration in accordance with SMA Rules’; ‘Singapore/English Law, Singapore Arbitration in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration’; and ‘Law and Place of Arbitration as Mutually Agreed’. All clauses permit an Arbitration-Mediation-Arbitration process, should the parties so agree, and all are such as to involve adjudicators with direct industry expertise that can be drawn upon for the purposes of evaluating the contract’s commercial context.

9.5 Conclusion

Gaps in privately developed and promulgated commercial standards may be filled in either at the time of contract formation or in the process of resolving a dispute. This research argues that, for the purposes of resolving issues upon which the standards are silent, the gap-fillers that are most likely to acquire widespread acceptance are ones that both (i) accord with the reasonable expectations of the parties to a particular contract and (ii) achieve the most economically efficient result. This should be borne in mind both when entering into a contract (as there may be issues which it would be beneficial to discuss and agree on explicitly in advance) as well as when arguing a case: if one is arguing the existence of a rule deriving from industry practice/tacit assumptions that should be implied into the contract as it informs reasonable expectations, it might be easier to persuade the adjudicator of the existence and applicability of the rule if it also makes sense from the point of view of economic efficiency (or commercial common sense). In view of the dispute-resolution options (featuring industry expertise) available for the purposes of resolving disputes in connection with contracts incorporating these standards, the consideration of the contract’s commercial context, and incident questions of reasonable expectations and/or economic efficiency, should not create undue difficulties.

⁸³ See BIMCO Dispute Resolution Clause 2015, available electronically at https://www.bimco.org/en/Chartering/Clauses_and_Documents/Clauses/~/_link.aspx?_id=1898BE6F28804864BFEDCDBFBA383561&_z=z (accessed 03.08.2015).

PART 3

PAYMENT AND SECURITY

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CHAPTER 10

Economic sanctions and letters of credit in international transactions

Damian Honey and Michael Buffham***

10.1 Introduction

The use of economic sanctions by the international community has become a feature of modern times. Sanctions regimes are dynamic and change constantly. The United Kingdom government is currently operating financial sanctions against 21 countries including Iran, Sudan, North Korea, Zimbabwe and Syria. Sanctions regimes are also operated by the UN, the EU, the United States, Singapore, Australia and others. For banks, this presents particular challenges. Banks are compelled to comply with sanctions in accordance with the laws of the jurisdiction in which they are incorporated. A failure to do so can result in substantial penalties. Where banks are incorporated in one country but have branches elsewhere, they may also be affected by sanctions imposed by the countries where those overseas branches are located. Added to this, some countries, particularly the United States, consider their sanctions to have an extraterritorial effect, and banks may choose to comply with sanctions even in circumstances where they are not strictly legally applicable to them, or the banks are not directly affected by them.

This chapter examines how economic sanctions may impact upon the performance of letters of credit in international transactions. The following topics will be covered:

- i) An overview of letters of credit and their role in international trade;
- ii) The autonomy of the credit;
- iii) Exceptions to the autonomy principle, including the common law doctrine of illegality and illegality under the place of performance of the contract; and
- iv) Sanctions clauses in letters of credit.

10.2 Letters of credit – an overview

Letters of credit are one of the most common methods of payment for goods in international trade. They are referred to as ‘the life blood of international commerce’. The importance of letters of credit is recognised by and deeply engrained in the common law. For instance, in *Intraco Ltd v Notis Shipping Corp of Liberia (The Bhoja Trader)*, it was noted by Donaldson LJ that:¹

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1 [1981] 2 Lloyd's Rep 256 at 257.

Thrombosis will occur if, unless fraud is involved, the Courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand.

Letters of credit are also the subject of international uniform rules, for instance the Uniform Customs and Practice for Documentary Credits (UCP 600) and the International Standby Practices (ISP 98). These uniform codes are intended to standardise the terms setting out the obligations of the parties under letters of credit which the parties may choose to apply to their contracts. Neither the UCP 600 nor ISP 98 are comprehensive codes dealing with all rights and obligations of the parties under all types of letter of credit. The rules do not have the force of law but must be incorporated into the relevant contract by the parties. However, they do help to provide uniformity in international payment obligations. Further reference will be made in this chapter to the uniform codes.

A letter of contract is, in essence, a contract by which a bank agrees to pay the beneficiary upon the happening of a specific event or, in connection with the export of specific goods, against presentation of specified documents. Letters of credit are popular because they strike a balance between the conflicting needs of a buyer and a seller in a transaction. On the one hand, the seller does not want to part with the goods until they are certain that they will be paid. On the other hand, the buyer does not want to pay until they have received the goods. By using a letter of credit, the seller is able to receive payment for the goods as soon as they have shipped them and the buyer knows when they pay for the goods that they have been shipped.

There are various different types of letter of credit. For instance:

- i) Revocable and irrevocable letters of credit: a revocable letter of credit is one which can be amended or revoked by the issuing bank at any time. A seller requiring security will not accept a revocable credit as they would risk the credit being amended or revoked after they have shipped the goods but before they have presented the documents for payment. Revocable credits are rarely used. An irrevocable credit, on the other hand, can only be amended or revoked with the consent of all the parties.
- ii) Sight credit or usance credit: the letter of credit may provide for payment either on presentation of documents by the sellers (a sight credit) or at a specified time in the future (a deferred payment credit). The commercial effect of a deferred payment credit is that it will defer the buyer's reimbursement obligations.
- iii) Confirmed and unconfirmed letters of credit: in an unconfirmed letter of credit, the issuing bank has the sole payment obligation in the credit. The issuing bank is usually the buyer's bank in the buyer's jurisdiction. This may not be acceptable to the seller/beneficiary, who may wish to receive a separate payment guarantee from their own bank in their own jurisdiction. If so required, the issuing bank will request an advising bank to confirm the credit. A confirming bank guarantees the payment on the due date on top of the issuing bank's payment guarantee.

- iv) Revolving letters of credit: this is a credit where the amount of the credit can be renewed or reinstated without any specific amendments to the credit. A revolving letter of credit can be cumulative, i.e. any sum not used during one period carries over and can be used for a subsequent period. Or it can be non-cumulative in that any sum not used in a period ceases to be available.
- v) Standby letters of credit: a standby letter of credit is essentially an autonomous guarantee, otherwise known as a demand guarantee, under which the issuer undertakes to pay if the applicant is in default and the beneficiary presents certain specified documents. A standby letter of credit does not have to be issued by a bank, but can be issued by any corporate party. The issuer has no involvement in the underlying transaction.

10.3 Autonomy of the credit

The issuer of a letter of credit undertakes to make payment of a specified amount against presentation of specified documents. This payment undertaking must be performed provided that the conditions set out in the letter of credit are fulfilled by the beneficiary. The payment obligation is an autonomous, standalone undertaking that must be performed regardless of any dispute between the parties to the underlying contract.

This concept is known as the 'autonomy of the credit'. In deciding whether to honour its payment obligation, the bank should only be concerned with whether the requirements of the letter of credit have been fulfilled and conforming documents presented. If so, the bank is obliged to make the payment, even if there is a dispute in the underlying contract and the bank's client asks the bank not to pay the beneficiary.

The rationale of the autonomy principle is well-founded. It serves to protect the payment obligation from disputes in the underlying contract and provides certainty by guaranteeing that payment will be made to the beneficiary even if its counterparty in the underlying contract complains about the performance or breach of that contract. The autonomy principle is not enshrined in statute, but is recognised by the common law. As Jenkins LJ stated in *Hamzeh Malas & Sons v British Imex Industries Ltd*:²

... the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question of whether the goods are up to contract or not ... It has also to be remembered that a vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is no mean advantage when goods manufactured in one country are being sold in another. Furthermore, vendors are often reselling goods bought from third parties ... That system of financing these operations, as I see it, would break down completely if a dispute

2 [1958] 1 All ER 262 at 263–264.

between the vendor and the purchaser were to have the effect of ‘freezing’ . . . the sum in respect of which the letter of credit was opened.

Furthermore, in *Edward Owen Engineering Ltd v Barclays Bank International Limited*, Lord Denning MR stated:³

. . . the performance bond stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

This extract alludes to an exception to the autonomy principle, which will be discussed in more detail below.

The autonomy of the credit is recognised in other jurisdictions.⁴ It is also enshrined in international conventions on the performance of letters of credit and demand guarantees. For example, Article 4.a of UCP 600 states that a credit:

. . . by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

Furthermore, Article 5 of UCP 600 states that ‘banks deal with documents and not with goods, services or the performance to which the documents may relate’. For a letter of credit subject to UCP 600, the common law principle of autonomy of the credit is supplemented by the independence principles set out in the uniform rules.

However, as indicated in the statement of Lord Denning MR in *Edward Owen Engineering Ltd v Barclays Bank International Limited* set out above, there are exceptions to the autonomy of the credit. It is with these exceptions that this chapter is primarily concerned.

10.4 Exceptions to the autonomy of the credit

Problems may arise where the underlying contract violates public policy, for example where the transaction is illegal. In such circumstances, there are two issues that must be considered:

- i) The English common law doctrine of illegality; and
- ii) Illegality under the place of performance of the contract.

³ [1978] QB 159 at 171.

⁴ For example, by the Supreme Court of Canada in *Bank of Nova Scotia v Angelica-Whitewear Ltd* [1987] 1 SCR 59 and in the United States of America in *Marino Ind. Corp v Chase Manhattan Bank*, NA 686 F 2d 112, 155 (2d Cir 1982) and *Alaska Textile Co Inc v Chase Manhattan Bank* 982 F 2d 813 at 815 (2d Cir 1992).

10.4.1 *The common law doctrine of illegality*

It is a basic principle of English common law that the courts will not enforce a contract the performance of which would be illegal.⁵ In the context of letters of credit, illegality can arise in two contexts:

- i) Where the letter of credit itself is illegal; and
- ii) Where the underlying contract is illegal.

The first situation is unlikely to arise at the time of issue of the letter of credit, because if it is illegal to issue a letter of credit (for example, due to a prohibition), it is extremely unlikely that any bank would do so if it is aware of the illegality. If a letter of credit were opened in breach of a prohibition, it would be illegal from the outset and therefore unenforceable, so the bank would not be obliged to perform its payment obligation.⁶ However, a more common example of illegality is where, although it was not illegal for the bank to open the letter of credit at the time of issue, a supervening prohibition has been imposed making it illegal for the bank to make a payment under the letter of credit, for example because economic sanctions have been imposed against a relevant country. An example of this situation is found in *Shanning International Ltd v Lloyds TSB Bank Plc*.⁷ Here, the House of Lords considered the enforcement of payment obligations affected by Council Regulation 3541/92, passed following the Iraqi invasion of Kuwait in 1990, which prohibited the satisfaction of Iraqi claims under contracts and transactions the performance of which was affected by the trade embargo imposed on Iraq. The seller, S, had agreed to sell medical equipment to a buyer, B, in Iraq. Payment was made by way of a 20 per cent prepayment, with the balance of payment made against a bank demand guarantee. An Iraqi bank, R, guaranteed B's payment obligation in reliance on a counter-guarantee from an English bank, L, for which L had security by way of an indemnity from S and a deposit by S of the advance payment in a deposit account with L. The obligations under the contract were nearly completed by the time the prohibition was imposed. S went into liquidation and claimed from L the repayment of the deposit. The prohibition was not expressly stated to be permanent. However, L refused on the basis that R maintained that L had a continuing liability under the counter-guarantee to R. The question for the court was whether R's claim against L and L's claim against S were prohibited.

The House of Lords held that, although the prohibition was not stated to be permanent, given that the purpose of the prohibition was to protect non-Iraqi parties who had been unable to perform their contractual obligations due to the embargo, in order to achieve that purpose, Council Regulation 3541/92 imposed a permanent prohibition on claims connected to commercial transactions affected by the embargo. S's performance of its contract with B had been prevented by the prohibition, so any claim that R or L might have made under the counter-guarantee

⁵ *Holman v Johnson* (1775) 1 Cowp 241.

⁶ *International Dairy Queen Inc v Bank of Wadley* 407 F Supp 1270 (MD Ala 1976).

⁷ [2001] UKHL 31.

or counter-indemnity fell within the prohibition and, as such, R and L were permanently prohibited from pursuing those claims. The Iraqi bank was therefore unable to claim payment from the English bank under the counter-guarantee, even after the sanctions were lifted. The illegality of one contract did not impact on the others; rather, each separate contract was illegal and therefore unenforceable. In circumstances where it has subsequently become illegal for a bank to make a payment under a letter of credit, for example by reason of a statutory prohibition, it therefore seems that the bank's payment obligation will be unenforceable.

The courts have also considered the second situation set out above, where a letter of credit is issued in circumstances where the underlying contract is or has become illegal. In *United City Merchants (Investments) Ltd v Royal Bank of Canada*,⁸ the House of Lords considered a situation where a letter of credit was issued in relation to an underlying transaction that violated export controls. In that case, an English company, C2, sold manufacturing equipment to a Peruvian company and agreed to double the price, payable in US dollars, to enable the Peruvian company to exchange Peruvian currency for the excess amount in breach of Peruvian exchange control regulations. A letter of credit for the inflated price was issued in Peru and confirmed by the defendant bank. C2 then assigned its rights under the letter of credit to C1. The goods were shipped a day later than the limit specified in the letter of credit. However, the loading brokers fraudulently entered an earlier date as the date of shipment on the bill of lading. On their face, the documents complied with the requirements of the letter of credit. However, the defendant rejected the documents and refused to pay under the letter of credit on the basis of the fraud. C1 then brought a claim for payment under the letter of credit.

The House of Lords held that a fraud entitling a bank to refuse to pay under a letter of credit on presentation of documents complying on their face did not extend to fraud to which the beneficiary was not a party. In principle, the defendant bank should therefore have paid on presentation of the documents. However, there remained a question of the extent to which the contract was unenforceable under Article VIII, Section 2(b) of the Bretton Woods Agreement, which states that '*Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member . . .*'. The House of Lords held that the question of whether a contract was unenforceable under the Bretton Woods Agreement was not a question of construction of the contract but one of substance of the transaction to which the contract would give effect. In this case, it was easy for the court to identify the monetary transaction concealed by the language used in the letter of credit and the underlying sale contract and, to the extent that the contracts did not violate applicable exchange control regulations, C1's claim was enforceable. It therefore seems that a payment obligation under a letter of credit will not be enforced by the court to the extent that the underlying transaction is illegal.

8 [1982] 2 All ER 720.

10.4.2 *Illegality under the place of performance of the contract*

The points discussed above concern the enforceability of obligations that are illegal as a matter of English law. However, a separate but related question arises where the relevant contract is illegal under the law of the place of performance, even though valid under the governing law of the contract.

In certain circumstances, the court may decline to enforce contractual obligations that conflict with the mandatory rules of the place of performance. This jurisdiction is derived from the EU Convention on the law applicable to contractual obligations (80/934/EEC) (the Rome Convention) and the Rome I Regulation on the law applicable to contractual obligations ((EC) 593/2008) (the Rome I Regulation).

Article 3(3) of the Rome Convention defines ‘mandatory rules’ in substantially the same terms as Article 3(3) of the Rome I Regulation, being rules ‘*which cannot be derogated from by contract*’. These provisions state that, even though the parties have chosen a foreign law as being applicable to the contract, where all other elements relevant to the situation at the time of the choice are connected to another country, that choice shall not prejudice the application of the mandatory rules of that country. Therefore, if a contract is governed by the law of one country, but all other elements relevant to the situation are connected to another country and the contract is illegal under the law of that country, then the English court will not enforce the contract on the basis of the illegality.

It is unlikely that this situation will arise in relation to a letter of credit. It is extremely rare for ‘all’ of the elements relevant to a situation to be connected with one country in the context of a letter of credit, which is commonly used in international sales. It is also uncommon for parties to a letter of credit to select the applicable law.

However, Article 7(2) of the Rome Convention also provides for the mandatory rules of the law of the *forum* to be applied irrespective of the law otherwise applicable to the contract (whether selected by the parties under Article 3 or by default in the absence of choice under Article 4). Article 9(2) of the Rome I Regulation contains a similar provision, albeit with a separate definition of ‘overriding mandatory provisions’ from the definition of ‘mandatory rules’ contained in Article 3(3). Article 9(1) states that ‘*Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*’ An example of such an overriding mandatory provision may be economic sanctions prohibiting payments to certain individuals or to beneficiaries in named countries.

In the context of a letter of credit, Article 7(2) of the Rome Convention and Article 9(2) of the Rome I Regulation therefore mean that, although a letter of credit may be valid under a foreign law by which it is governed, the English court may refuse to enforce payment obligations that violate applicable economic sanctions, which constitute a mandatory rule or overriding mandatory provision of the forum. The same may be said of exchange control regulations involving the currency

of a country that is a member of the IMF. Under the Bretton Woods Agreement, an agreement that involves the currency of a Member State and that is subject to exchange control regulations in that Member State is unenforceable in any Member State. On the basis of Article 7(2) of the Rome Convention and Article 9(2) of the Rome I Regulation, the English court will therefore not enforce a letter of credit that involves the currency of a member of the IMF and is an exchange contract the performance of which is illegal under the exchange control regulations of the relevant Member State. Although *United City Merchants* was decided on the basis of common law principles, it is arguable that the same result would now be reached under either the Rome Convention or the Rome I Regulation.

However, the position is less certain where the relevant mandatory rule is a rule of a country that is not the forum of the applicable law. Article 7(1) of the Rome Convention provides that:

When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

However, when implementing the Rome Convention in the United Kingdom, it was felt that Article 7(1) was too wide, applying in any case involving a country with which the situation has a 'close connection'. Under Section 2(2) of the Contracts (Applicable Law) Act 1990, Article 7(1) therefore does not have the force of law in the United Kingdom. In the case of illegality in a foreign place of performance, it remains unclear whether the English court would enforce the contract in a case governed by the Rome Convention.

Article 9(3) of the Rome I Regulation contains a similar provision, which states that:

Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

This provision does apply in the United Kingdom. It is narrower in scope than Article 7(3) of the Rome Convention, as it:

- i) Only applies in respect of overriding mandatory provisions of the place of performance, as opposed to any country with which the situation has a 'close connection'; and
- ii) Is only relevant where those overriding mandatory provisions render performance illegal, which is not a limitation that applies in Article 7(3) of the Rome Convention.

In a Rome I Regulation case, the English court may therefore apply overriding mandatory provisions of the place of performance to the extent that they render performance of the relevant obligation illegal.

There is therefore authority to support the proposition that the English court will not enforce a contract the performance of which is illegal, either:

- i) Under the common law doctrine of illegality, where the letter of credit itself or the underlying transaction is illegal;
- ii) Where the performance of the contract is illegal under the ‘mandatory rules’ of the forum in accordance with Article 7(2) of the Rome Convention or the ‘overriding mandatory provisions’ of the forum in accordance with Article 9(2) of the Rome I Regulation; or
- iii) Where the performance of the contract is illegal under the ‘overriding mandatory provisions’ of the place of performance of the relevant obligation in accordance with Article 9(3) of the Rome I Regulation.

However, there remain concerns amongst some banks regarding the imposition of economic sanctions, particularly in relation to jurisdictions purporting to have extraterritorial effect, even in circumstances where the banks are not directly affected by the relevant sanctions. It is in relation to these concerns that the use of sanctions clauses in letters of credit has developed.

10.5 Sanctions clauses in letters of credit

Sanctions clauses have been the subject of an ICC Guidance Paper entitled ‘*The Use of Sanctions Clauses in Trade Finance-Related Instruments Subject to ICC Rules*’⁹ (the ICC Guidance Paper).¹⁰

There is no definition or standard form of sanctions clause and they may vary considerably in their scope. Some clauses are merely informational and simply state that the bank is under an obligation to comply with applicable laws and regulation. An example of such wording is set out in paragraph 2.2 of the ICC Guidance Paper:

[The bank] is under a statutory duty to comply with sanctions laws and regulation mandatorily applicable to [it].

Some countries have legislation that prohibits use of the word ‘boycott’ or ‘sanctions’ language in any transaction. If this is the case, then the inclusion of a sanctions clause in a letter of credit may prompt a party to whom such a letter of credit is addressed to reject the instrument. A failure to do so could attract legal liability.

If a sanctions clause purports to give the bank a discretion as to whether to honour the letter of credit, it may affect the irrevocability of the letter and reduce its value as credit support. A letter of credit may also simply refer to a bank’s internal sanctions policy, which may or may not go beyond what is required under applicable sanctions law and regulation. Reference to an internal policy that does

⁹ First published 26 March 2010 – Document No. 470/1129, updated on 20 August 2014 – Document No. 470/1238.

¹⁰ References in this chapter to the ICC Guidance Paper are to the August 2014 version, unless otherwise stated.

go beyond what is required by the relevant law or regulation is an example of a sanctions clause that gives a bank a discretion as to whether to honour payment. In this case, a question arises as to whether the bank has even assumed a legally binding obligation.¹¹

A sanctions clause that refers to a bank's internal sanctions policy also puts a nominating bank in a very difficult position, as it will not be aware of what sanctions policy the issuing bank will apply. If the relevant policy goes beyond the scope of sanctions law and regulation that is mandatorily applicable to the bank, then it will be uncertain whether a nominated bank that honours a compliant presentation of documents would be reimbursed.¹² A nominated bank should therefore not only consider risks associated with the issuing bank and the relevant country, but also the risk that it will not be reimbursed as a result of sanctions law or regulation or an internal sanctions policy.

Some examples of sanctions clauses are set out in the ICC Guidance Paper. An example of an informative sanctions clause that does not go beyond applicable laws and regulation is as follows:

Presentation of document(s) that are not in compliance with the applicable anti-boycott, anti-money laundering, anti-terrorism, anti-drug trafficking and economic sanctions laws and regulations is not acceptable. Applicable laws vary depending on the transaction and may include United Nations, United States and/or local laws.¹³

An example of a clause that refers to internal policies that are unknown to the nominated bank is as follows:

[Bank] complies with the international sanction laws and regulations issued by the United States of America, the European Union and the United Nations (as well as local laws and regulations applicable to the issuing branch) and in furtherance of those laws and regulations, [Bank] has adopted policies which in some cases go beyond the requirements of applicable laws and regulations. Therefore [Bank] undertakes no obligation to make any payment under, or otherwise to implement this letter of credit (including but not limited to processing documents or advising the letter of credit), if there is involvement by any person (natural, corporate or governmental) listed in the USA, EU, UN or local sanctions lists, or any involvement by or nexus with . . .¹⁴

This is problematic, as it creates doubt concerning whether the bank will comply with its irrevocable payment obligation.

A further example of a problematic clause is one that gives the bank discretion beyond the scope of the requirements of applicable law and regulation:

Trade and economic sanctions ('sanctions') imposed by governments, government agencies or departments, regulators, central banks and/or transnational organisations (including the United Nations and European Union) impact upon transactions involving countries, or persons resident within countries currently including [list of relevant countries] . . . Issuing bank and all of its related bodies corporate might be subject to and affected by sanctions, with which it will comply. Please contact issuing bank for any clarification before presenting documents to issuing bank for negotiation or

11 ICC Guidance Paper, at paragraph 2.4.

12 ICC Guidance Paper, at paragraph 2.5.

13 ICC Guidance Paper, at paragraph 3.1.a.

14 ICC Guidance Paper, at paragraph 3.1.b.

undertaking any dealings regarding this credit involving countries or persons affected by sanctions. Issuing bank is not and will not be liable for any loss or damage whatsoever associated directly or indirectly with the application of sanctions to a transaction or financial service involving issuing bank. Issuing bank is not required to perform any obligation under this credit which it determines in its discretion will, or would be likely to, contravene or breach any sanction for it or any of its affiliates. This clause applies notwithstanding any inconsistency with the current edition of the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits.¹⁵

Having considered the issues and provided examples of the different types of sanctions clause used in practice, the ICC Guidance Paper concludes that *'it is recommended that practitioners . . . refrain from including such clauses that bring into question the bank's commitment to the irrevocable nature of a transaction, or where the use of such a clause is in conflict with local law'*.¹⁶ It is suggested that this recommendation is not particularly helpful, as it fails to appreciate the regulatory and compliance environment in which trade finance banks operate – particularly those with multiple affiliates and branches. The ICC also suggests that *'practitioners should refrain from bringing into question the irrevocable, independent nature of the credit . . . the certainty of the payment or the intent to honour obligations'*.¹⁷ However, the commercial reality is that many banks will simply not run the risk of breaching sanctions regimes, the ramifications of which can be extremely serious and costly, even if those sanctions laws and regulations are not directly applicable to the relevant entity. Faced with a choice between not honouring the letter of credit and being in breach of sanctions, there is a very real possibility that a bank would see the breach of a contract as being the lesser of evils.

A question therefore remains as to how banks can seek protection in circumstances where performing a payment obligation under a letter of credit would violate sanctions law and regulation, without calling into question the irrevocable payment obligation under the letter of credit. It is suggested that, as a matter of English law, a potential answer is to be found in the principles of illegality discussed in Section 10.4 of this chapter.

As set out above, English courts will not enforce a contract the performance of which is illegal, either:

- (i) Under the common law doctrine of illegality, where the letter of credit itself or the underlying transaction is illegal;
- (ii) Where the performance of the contract is illegal under the 'mandatory rules' of the forum in accordance with Article 7(2) of the Rome Convention or the 'overriding mandatory provisions' of the forum in accordance with Article 9(2) of the Rome I Regulation; or
- (iii) Where the performance of the contract is illegal under the 'overriding mandatory provisions' of the place of performance of the relevant obligation in accordance with Article 9(3) of the Rome I Regulation.

¹⁵ ICC Guidance Paper, at paragraph 3.1.c.

¹⁶ ICC Guidance Paper, at paragraph 4.1.

¹⁷ ICC Guidance Paper, at paragraph 4.2.

Accordingly, the law is and has always been that if performance is illegal, then no payment will be made to the beneficiary. If the sanctions clause in the relevant letter of credit states this, it therefore goes no further than the position under English law.

However, the position is not that simple. Illegality at common law is only applicable to the bank considering the transaction. Therefore, if the letter of credit is governed by English law and issued, advised or confirmed in, say, Geneva, the illegality issue will only be effective if performance would be illegal under Swiss law or English law. If performance would be caught by sanctions in the United States, where the relevant bank has an affiliate, then performance may be legal as a matter of law for the bank in its country of incorporation. However, the bank's affiliate may well be in breach of regulatory obligations in the United States. Furthermore, some banks (for example in the Middle East and North Africa region) are inserting sanctions clauses even though technically they will not be caught by United States or EU sanctions regimes. This mainly arises from political pressure. Equally, the use of a sanctions clause does not just create a problem for a beneficiary. The use of sanctions clauses creates particular difficulties for a confirming bank or nominated transferring bank, which may face uncertainty as to whether it will be reimbursed if it makes payment against a compliant presentation of documents. UCP 600 does not refer to sanctions. The issue that this creates is that a sanctions clause is completely contrary to the irrevocable nature of a letter of credit as defined in UCP 600.

The ICC Guidance Paper recognises some of these difficulties, but the suggestion not to include a sanctions clause and to defend and maintain the irrevocable nature of a letter of credit is at best unrealistic. This suggestion ignores the very significant regulatory and political pressures faced by banks in relation to international sanctions regimes. It is suggested that some protection is offered by English law principles regarding illegality of contracts. However, in view of the difficulties highlighted above, in some circumstances it will ultimately be a commercial or political matter for a bank to decide whether to honour its irrevocable payment obligation or risk breaching relevant international sanctions laws.

Islamic letters of credit – square peg in a round hole

*Professor Jason Chuah**

11.1 Introduction

There has been much discussion in recent times about the massive expansion of Islamic finance – the UK government’s commitment to establish London as one of the largest sukuk markets in the world points toward this trend. Hitherto much of the legal literature on Islamic finance has focussed on the money markets, consumer credit and Islamic banking. Less covered is the field of Islamic trade finance and payment. However, from the global trade perspective, especially where international trade is considered to be pivotal to international development, the subject of Islamic trade finance and payment cannot be ignored. Central to trade finance and payment is the letter of credit. Letters of credit, as we know, are governed largely by the International Chamber of Commerce’s UCP 600. There is no similar instrument for Islamic letters of credit. Although the ICC represents chambers of commerce from many countries, the UCP 600 is essentially based on the idea of an autonomous payment instrument as recognised and given effect to in the twentieth century by Western legal systems.¹ That is of course not to say that the idea of an autonomous payment instrument is unknown in Islamic legal history – a form of an ‘abstract’ bill of exchange was used in the middle ages in the Islamic world.² Indeed, some scholars were of the view that the medieval Islamic bill of exchange had influenced and shaped the Western idea of bills of exchange.³ The present chapter asks how equipped the UCP 600 and contemporary shipping practice are to accommodate emerging Islamic payment instruments. The wider theoretical question concerns the management of the interaction

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1 F. Rooy, *Documentary Credits* (Kluwer, 1984), p. 9.

2 See B. Geva, *The Payment Order of Antiquity and the Middle Ages: A Legal History* (Hart, 2011), chapter 6. The notion of suftaj or suftajah and other payment instruments were in use in medieval trade in the Islamic world. Suftajah is defined by the Islamic Institute of Banking and Insurance as ‘a type of banking instrument used for the delegation of credit during the early Muslim period, especially the Abbasides period (749 to 1258 AD). It was used to collect taxes, disburse government dues and transfer funds by merchants and was commonly used by travelling merchants. It involved three parties: the payor, the payee and the transmitter. Suftajah could be payable on a future date or immediately. A suftajah held by one party could be endorsed to another party. The Arab merchants were using endorsements (hawalah) since the days of Prophet Muhammad (pbuh). It differs from the modern bill of exchange in that a sum of money transferred by suftajah had to keep its identity and payment had to be made in the same currency’ (http://www.islamic-banking.com/glossary_S.aspx).

3 B. Geva, above, at section 6.

between ‘Western’ international trade legal norms and nascent practice of Islamic finance. It is also to be seriously questioned whether in a globalised world of trade and shipping, the UCP 600, a transnational soft instrument expressed to be committed to trade promotion, could and should be reshaped to facilitate Islamic trade finance and payment. This paper will not address the issue from a Shari’a point of view – the paradigm being one relating to the treatment of the Islamic letter of credit in a Western or conventional trade finance legal environment.

11.1.1 Nature of Islamic letters of credit

Islamic letters of credit are perhaps a misnomer. They are actually instruments resembling letters of credit as we know them but functioning within a Shari’a-compliant⁴ mercantile environment. Thus, at one level, these payment instruments might conceivably simply be made subject to the governance of conventional rules on letters of credit, namely, the UCP 600. At another level, however, the constraints imposed by Shari’a on the payment instrument make it difficult to operate efficaciously within the UCP 600 framework.

What are the constraints under Shari’a? In brief, there are three proscriptions which commercial transactions are subject to:

- The prohibition of *riba* or interest
- The need to avoid *gharar* and *maysir* (speculation or gaming)
- The prohibition of *haram* transactions (namely, a commercial motive or contractual performance which is unlawful or immoral under Shari’a)

It is outside the scope of this paper to discuss the concept of *riba* from a Shari’a point of view. As a matter of methodology, we have taken the definition of *riba* as provided for in the Qur’an as a starting point. At Sura II, 275–79 of the Qur’an⁵ it is stated that:

. . . Allah has made buying and selling lawful and has made the taking of interest unlawful. Remember, therefore, that he who desists because of the admonition that has come to him from his Lord, may retain what he has received in the past; and his affair is committed to Allah. But those who revert to the practice, they are the inmates of the fire; therein shall they abide. . . O Ye who believe, be mindful of your duty to Allah and relinquish your claim to what remains of interest, if you are truly believers.

4 Shari’a is generally defined as ‘Islamic law’; it is, however, not law properly so-called within the common law or western civil law contexts. In *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19; [2004] 1 WLR 1784, the Court of Appeal expressed the view that Shari’a contained both legal and religious provisions making it difficult for a common law court to apply and enforce it as the applicable law of the contract under the Rome Convention 1980. On the rejection of Shari’a law as applicable law, see too J. Chuah, ‘Islamic Principles Governing International Trade Financing Instruments: A Study of the Morabaha in English Law’, (2006) 27 Nw. J. Int’l L. & Bus. 137. It should be noted that the Rome Convention has now been replaced by the EU Regulation 593/2008 on the law applicable to contractual obligations (Rome I). Although the Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law (Recital 13, Preamble), if *Beximco* is to be followed, Shari’a nevertheless would continue not to qualify as ‘law’ for the purposes of the definition of ‘a non-State body of law’. This matter continues to be debatable; it, however, falls outside the scope of this article.

5 The version used here is *The Quran*, translated by Muhammad Zafrulla Khan (Curzon Press, 1971).

But if you do not, then beware of war from the side of Allah and his Messenger. If, however, you desist, you will still have your capital sums; thus you will commit no wrong, nor suffer any wrong yourself.

Sura III 130 adds that:

O Ye who believe, devour not interest, for it goes on multiplying itself; and be mindful of your obligation to Allah that you may prosper.

Additionally, the Prophet has said:

Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, like for like, and hand-to-hand. Whoever pays more or takes more has indulged in *riba*. The taker and giver are alike (in guilt).⁶

Taken literally,⁷ interest shall not be imposed on any loan extended.

Gharar is usually translated as 'trading in risk'⁸ – gambling or gaming is naturally the most clear-cut instance of such a trade in risk. However, there is less consensus as to the precise scope of this trading in risk – commentators have alluded to differences between classical and contemporary Islamic thinking, and also the differences between the schools of thought in Islam.⁹ Commercial contracts which have been scrutinised under the lenses of *gharar* include derivatives, forward trading, hedging contracts, the sale of unascertained goods, the sale of future goods and so on. Many Islamic law commentators have stressed the importance of finding some form of deception, bad faith or sharp practice in the transaction in question before it qualifies as *gharar*. There is also generally a distinction to be had between minor¹⁰ and substantial *gharar*.¹¹

6 As narrated by Abu Said al-Khudri.

7 See M. Abu Saud, 'Islamic View of Riba', *Studies in Islamic Economics* (The Islamic Foundation Leicester, 1983), pp. 82–83; A. Ali, *The Meaning of the holy Qur'an, Commentary no. 324–326* (Amana, 1992), p. 115. See also Prof El-Gamal's seminal piece in "Interest" and the Paradox of Contemporary Islamic Law and Finance', (2003–2004) 27 *Fordham Int'l L.J.* 108. Note that not all 'interest' is considered by Islamic scholars to be *riba*, and by the same token, not all *riba* is monetary interest.

8 There is extensive literature on the subject. For examples of the translation of the term *gharar* as 'risk', see F. Vogel & S. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (Kluwer, 1998), p. 87; M. El-Gamal, *Islamic Finance: Law, Economics, and Practice* (CUP, 2006), pp. 47–49, 58–62. For examples of the translation of the term as 'uncertainty', see N. J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964), pp. 45, 138. For examples of the translation of the term as 'risk and uncertainty', see H. Yanagihashi, *A History of the Early Law of Property: Reconstructing the Legal Developments* (Brill, 2004), p. 276; J. Schacht, *An Introduction to Islamic Law* (Clarendon Press, 1982), pp. 135, 146–147. For a general economics treatment of the principle see M. El-Gamal, *An Economic Explication of the Prohibition of Gharar in Classical Islamic Jurisprudence*, available at <http://www.ruf.rice.edu/~elgamal/files/gharar.pdf>.

9 N. Nordin, S. Aziz, A. Ahmad & N. Daud, *Contracting with Gharar (Uncertainty) in Forward Contract: What Does Islam Says?* (2014) 10 *Asian Social Science* 37.

10 An example is provided in these terms by the Islamic Institute of Finance and Banking: 'For example, it is not possible to know whether each nut in a sack of nuts offered for sale is of edible quality, yet this is a minor *gharar* (the buyer can of course test a few of the nuts before buying) and so the sale of nuts in a sack is generally permitted. The facilitation of ease is invoked as the justifying principle here, along with the absence of any clear inequality in the values of the exchanged items (in this case, money and nuts)' (http://www.islamic-finance.com/item160_f.htm abridged from T. El-Diwany, *The Problem With Interest* (3rd edn, Kreatoc, 2010)).

11 Ibid.

As to the requirement that the commercial transaction should generally be lawful and not immoral under Shari'a, some of more common admonitions are made against exploitative transactions such as hoarding of goods, price manipulation and fraud. The *haram* nature is not confined to the morality of the transaction but also the [Islamic] lawfulness of the goods in question, so that the sale of pork products, alcohol, carrion (for human consumption) and idols is largely considered to be *haram*.¹² It has been suggested also that transactions or products produced as a result of labour oppression and deprivation of the labourer's social justice would also be *haram*.¹³

The letter of credit is considered to be 'Islamic' if the underpinning transactions satisfy these three basic conditions for lawfulness.

11.2 Shari'a-compliant transactions using a letter of credit

In terms of documentary credits, it may be said that there are three¹⁴ principal methods of Shari'a-compliant trading:

- Letter of credit *al-murabahah*
- Letter of credit *al-wakalah*
- Letter of credit *al-musharakah*

11.2.1 Letter of credit *al-murabahah*

In this arrangement, the merchant (bank customer) will obtain both the letter of credit and financing from the bank. The goods to be purchased or imported will be bought by the bank and subsequently sold to the customer at cost plus profit. No remittance is to be charged on the transaction. There are several common steps in the arrangement.

- The buyer and bank agree for the buyer to act as the bank's representative in purchasing the goods.
- The buyer arranges with the seller for the delivery of the goods.
- The bank issues a letter of credit *murabahah* to the seller.
- The seller tenders conforming documents in order to be paid, either directly to the issuing bank or a nominated bank.
- The bank resells the goods to the buyer adding a pre-agreed profit.
- Where the buyer is not in a position to pay for the goods, the bank may extend a short-term credit facility to the buyer enabling him to take physical possession of the goods and sell them on. The sale proceeds will then be used to pay back the bank on the originally-agreed cost plus profit terms.

¹² See F. Vogel & S. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (Kluwer, 1998), p. 87, referred to above.

¹³ See for example the arguments made in S. Hascall, 'Islamic Commercial Law And Social Justice: Shari'ah-Compliant Companies, Workers' Rights, And The Living Wage' (2014) 88 St. John's L. Rev. 291.

¹⁴ Two other less-common forms of Islamic contracts which might entail the use of a letter of credit are *al-daman* and *al-mudarabah*.

The *murabahah* continues to be very popular amongst Islamic traders – there are several advantages. Unlike other models of Islamic financing, this relationship is primarily a sale transaction and entered into at arm's length. Other forms of financing involve a more proximate relationship, sometimes characterised as a fiduciary relationship.¹⁵ From a legal perspective, whether in Shari'a or the relevant applicable law, the more proximate the commercial relationship, the more difficult it is to construe and define its terms. Traders are understandably less keen to commit themselves to such a relationship which smacks of uncertainty. Another advantage is its simplicity – again at its essence, this is a sale and purchase of goods contract. So structuring it (to use finance parlance) should be fairly straightforward. *Murabahah* transactions are thus widely used to finance international trade, as well as for interbank financing and liquidity management through a multistep transaction known as *tawarruq*,¹⁶ often using commodities traded on the London Metal Exchange (LME).

There are some distinct disadvantages. From a commercial perspective, the *murabahah* may be not satisfactory for large capital or infrastructure goods.¹⁷ The amounts involved in these goods are substantial, thus increasing the risk to the bank as financier,¹⁸ and decreasing the buyer's creditworthiness. In the developing world where capital and infrastructure goods are essential but liquidity, both in foreign reserves and local currencies, is limited and creditworthiness is an issue, commercial banks are less inclined to commit themselves to a *murabahah*. Thus, the importance increases of Islamic development banks such as the International Islamic Trade Finance Corporation. An internationally backed development bank, unlike a private commercial bank, will have both the capital¹⁹ and expertise to 'lend' on *murabahah* terms. What is especially noteworthy here is that through the use of Islamic trade finance and documentary credit, many important agricultural, oil and gas and mining projects have been successfully established in many parts

15 See the *mudarahah*, for example, where capital is provided by the investor to the beneficiary (*mudarib*). The capital will be managed by the *mudarib* and any profit generated from the capital is shared between the two based on a mutually-agreed profit sharing ratio (PSR) whilst financial losses are borne by the investor provided that such losses are not due to the *mudarib*'s misconduct (*ta'addi*), negligence (*taqsir*) or breach of specified terms (*mukhalafah al-shurut*). There is implied a duty of confidence (*aqd alamanah*) between the parties. See A. Gafoor, *Mudarahah-Based Investment and Finance* (2001) (<http://users.bart.nl/~abdul/article2.html>).

16 *Tawarruq* is described in M. Hussain, A. Shahmoradi & R. Turk's IMF Working Paper 'Overview of Islamic Finance' (WP/15/20) (June 2015) at <http://www.imf.org/external/pubs/ft/wp/2015/wp15120.pdf>, in these terms: '[it] means in Arabic the acquisition of minted silver, or al wariq, against another asset. However, *tawarruq* has become controversial among Shari'ah scholars because of its divergence of its use from the spirit of Islamic finance. Under commodity *murabahah*, a customer in need of liquidity or financing arranges for an Islamic bank to buy metals for that amount on his behalf. The bank then sells the metals to the customer at a mark-up that is payable over a period of time (overnight, one month, 12 months, etc.). In turn, the client immediately sells the metals on the spot market and obtains the needed liquidity. *Tawarruq* is most disliked by Shari'ah scholars when the borrower sells the commodity back to the original seller' (p. 8).

17 See C. Richardson, 'Islamic Finance Opportunities in the Oil and Gas Sector: an Introduction to an Emerging Field', (2006) 42 Texas Int'l L. J. 116, 130.

18 For example, if the buyer does not take delivery, it is a huge burden for the bank to liquidate the asset in an inelastic market, as the asset would usually have been built to order.

19 As regards the International Islamic Trade Finance Corporation, in their accounts for 2014, the declared financial assets totalled \$US 841 million and the paid-up capital amounted to \$US 741 million (IITFC Annual Report 2014 at <http://itfc-idb.cld.bz/ITFC-Annual-Report-2014-English#60/z>).

of the poorer Islamic countries. The IMF reported in 2014 that imports by the Middle East, North Africa, Afghanistan and Pakistan totalled \$US 46.05 billion and exports were valued at \$US 7.88 billion.²⁰ The data shows how dependent the 'Islamic' region is to imports, hence, the continued importance of international trade payment tools like the letter of credit which comply with Shari'a.

There is also a commercial risk in that where the buyer and seller are too closely connected (e.g. part of the same corporate group), the original sale may not be a genuine commercial transaction but simply a sham to obtain financing from the bank. Measures to be introduced and applied to manage this risk will naturally have cost implications for all concerned.

From a legal point of view, although the *murabahah* is structured as a sale of goods, the bank and buyer (and conceivably the actual seller) do not perceive it as one. For them it is essentially a credit and finance arrangement. There are therefore some key exclusions to build into the arrangement, such as the bank's implied duties as a seller under any applicable statutory law (such as the Sale of Goods Act 1979) or non-statutory rule (arising, say, at common law). It is outside the scope of this paper to consider how and to what extent these duties implied by law could be excluded or limited for the bank acting as seller, and, indeed, whether it is proper so to do. It suffices to state that where permissible, those duties should ideally be excluded or limited by the bank-buyer relationship simply because its underlying purpose is a credit or finance one, rather than for the transfer of ownership. Where that is not possible because of the strictures in the applicable statute law, then appropriate indemnities should be sought from the actual seller or their nominees/sureties.²¹ Therefore a clear appreciation of how the applicable law treats and recognises these departures and avoidance devices is crucial to the successful performance of a *murabahah* contract.

As alluded to above, other short-term credit facilities on Shari'a-compliant terms may additionally be available. For example, a type of short-term facility the customer could apply for is a *mudarabah* trust receipt. The trust receipt enables them to collect the goods before payment of the sight or usance bills,²² since payment to the sellers would be advanced by the bank against an Islamic letter of credit issued by the same bank. The trust receipt is issued only if the terms of the Islamic letter of credit have been met by the customer. The bank will retain the legal title to the goods but relinquish physical possession to the buyer or importer of the goods, who acts as trustee or agent of the bank (hence the term 'trust receipt'). The plan is for the buyer then to sell the goods on and repay the bank (amount owing plus profit) out of the proceeds of the sales on or before the maturity of the trust receipt. Other

20 IMF Direction of Trade Statistics (DOS) (data retrieved on 28 September 2015).

21 It should also be pointed out that Shari'a prohibits the contractual exclusion of key duties – this view is shared by all the five Islamic schools of thought (Zahiri (Al-Muhalla, vol. 9, p. 44); Maliki (Al-Sharh al-Kabir, vol. 3, p. 112); Shafi (Al-Kāsāni, Badāi' a-Ṣanāi', vol. 5, p. 173; Al-Shirāzi, al-Muhdhab, vol.1, p. 295); Hanbali (Ibn al-Qayyim, Aālām al-Muwaqqi'in, vol. 3, p. 406); Hanafi (M. Qadari Bāsha, Murshid al-Hayrān, Art. 512)).

22 The maximum tenor is usually up to 180 days, determined based on the turnover period of goods. The margin of advance is usually 100 per cent of the bill amount plus other payments, e.g. freight/carrier charges and import fees.

credit facilities, usually short-term, may include the Islamic Accepted Bill²³ or Islamic Export Credit Refinancing.²⁴ It should, however, be remembered that these credit facilities will need to be assessed on a case-by-case basis as to their lawfulness in Shari'a. Whether they are in fact a way of charging interest in disguise is ultimately a matter for Shari'a experts and tribunals, but many Islamic jurisdictions and/or banks will have established relevant Shari'a advisory councils and boards of supervision to scrutinise the legality of these complicated offerings.

The murabahah has often been criticised for not being entirely Islamic – the mark-up or profit element has been perceived by many to be simply 'interest':

These transactions involve, for the most part, trade financing deals between Islamic investors and well-known multinationals seeking lowest-cost working capital loans. Although these multi-billion-dollar contracts have been popular for many years, many doubt the banks truly assume possession, even constructively, of inventory, a key condition of a religiously acceptable murabaha. Without possession, these arrangements are condemned as nothing more than short-term conventional loans with a predetermined interest rate incorporated in the price at which the borrower repurchases the inventory.²⁵

It is, however, safe to say that a growing number of Islamic banks and their boards of supervision have been changing their pricing strategies so that the mark-up would be in proportion to the magnitude of the service rendered as opposed to the sum involved and to prevailing interest-rate benchmarks.²⁶

11.2.2 The letter of credit al-wakalah

Under the *al-wakalah* concept, the customer nominates the bank to act on their behalf – this is a principal-agent relationship and, like its Western counterpart, it connotes a fiduciary relationship between the parties. Unlike the *murabahah*,²⁷ here the buyer is required to put the bank in funds to open the letter of credit. That means that the letter of credit is always drawn on a sight basis only. Payment for the documents is thus not eligible for financing by the bank.

The letter of credit is usually issued on an ad-hoc basis, i.e. for specific purposes only. That is because it is uncommon for the banks to agree to a standing and

23 The Central Bank of Malaysia describes the Islamic Accepted Bill (which they abbreviate to AB-i) process in this way: "The general procedure for the creation of an AB-i is as follows: (i) An acceptance financing facility is arranged with a bank; (ii) The required documentary evidence of trade is presented to the bank for the purpose of drawing an AB-i on the bank/purchaser; and (iii) Once the bank is satisfied that the documents are in order and the AB-i complies with the terms of the AB-i facility and all applicable conditions for the creation of AB-i specified in these Guidelines, the bank shall: (a) in the case of AB i-Purchase, draw an AB-i to be accepted by the purchaser/importer; and (b) in the case of AB-i-Sale, accept the AB-i" (http://www.bnm.gov.my/guidelines/01_banking/04_prudential_stds/05_abi.pdf).

24 This is essentially an Islamic version of export credit insurance and is available to pre- and post-shipment financing (i.e. available to either the importer or exporter).

25 See F. Vogel & S. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (Kluwer, 1998), p. 9.

26 I. Warde, *Islamic Finance in the Global Economy* (Edinburgh University Press, 2000), p. 134.

27 Under the *murabahah*, the buyer does not have to put the bank in funds at the opening and issue of the letter of credit; they only need to reimburse the bank (cost plus profit) when they sell the goods on or take delivery of them.

rolling relationship of ‘agency’ of this nature. As agent, the bank will be careful to ensure that every new discrete transaction or request is properly assessed before a commitment is made to act. The bank charges a fee for its services but no remittance interest is charged on the transaction.

The main commercial disadvantage of the letter of credit *al-wakalah* is the fact that it cannot operate as a financing instrument – it is a pure and simple payment instrument. Therefore, here too we have a financing tool which may not be ideal for large infrastructure and capital goods contracts.

11.2.3 *The letter of credit al-musharakah*

Musharakah is a profit-and-loss sharing ‘partnership’ and probably the most authentic form of Islamic financing.²⁸ It usually entails two or more partners entering into an agreement to provide capital jointly to finance a project or to take possession or ownership of property, movable or immovable, for commercial returns. The ownership terms may be on a permanent or diminishing basis. Partners in *musharakah* have a right in Shari’a generally to take part in management. They therefore assume the greatest risk in the venture compared to other Islamic financing modes. Profits are distributed according to pre-agreed ratios, and losses are shared in proportion to capital contribution. In an international trade transaction, the buyer and the bank will enter into a venture to purchase the goods jointly. The letter of credit is issued by the bank, but there may be no applicant, as the bank is a joint purchaser. That said, the letter of credit is issued jointly – it remains a unilateral issuance by the bank. The letter of credit could then be integrated into the correspondent banking system for payment and discounting.

The obvious commercial advantage is the degree of control the bank has in the purchase, and the reward from the resale or reinvestment of the purchased goods is likely to be commensurate with the risk undertaken by the bank. A legal complication, however, is that whilst the *musharakah* may be characterised as a partnership and a fiduciary relationship in Shari’a,²⁹ it is less clear whether it would be so treated in Western partnership law. As far as the English Partnership Act 1890 is concerned, s. 2(3) provides that ‘The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business . . .’.

28 A. Jobst (2007), “The Economics of Islamic Finance and Securitization,” IMF Working Paper 07/117 (International Monetary Fund, 2007). There are three *musharakah* structures: (i) Permanent *sharikah* – this is a partnership of permanent nature, i.e. a going concern; (ii) Temporary (Redeemable) *sharikah* – the partnership may be for a limited time period, after that it would be redeemed usually through the relinquishment of shares by one partner to another partner or third person (redemption can take place privately or on the open market); (iii) Diminishing/declining *sharikah* – occurs when a partner buys the share of the other partner in instalments gradually until the ownership of the asset is completely transferred to second partner. In such a *sharikah*, the Islamic bank would make a joint purchase or acquisition of the asset in question with the term that the customer will gradually buy it back.

29 M. Mansoori, “Is Islamic Banking” Islamic? Analysis of Current Debate on Shari’ah Legitimacy of Islamic Banking and Finance’ (2011) 50 *Islamic Studies* 383, 410.

The inference is not one of law but of fact.³⁰ It should also be noted that if the musharakah is structured on the basis of the sharing of gross returns, s. 2(2) of the Partnership Act 1890 makes it plain that ‘the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived’. Another problematic issue is that if there is no partnership in the terms of the Partnership Act, is there a joint venture, and what is the nature of that relationship? It is largely a question of construction of the agreement as to the content of the mutual duties between the parties. It seems less likely that a commercial joint venture which falls short of a partnership would be held to be a fiduciary relationship envisaged by Shari’a.³¹

11.3 UCP 600 compliance

In all three Shari’a-compliant trading forms, it is quite clear that in Islamic thought, it is important for the financier to participate in the asset and have some degree of moral responsibility and commitment to the commercial transaction. Shari’a, however, is clear that ‘the allocation of risks and rewards and sharing in the resulting profits or losses’ is to be encouraged and promoted.³² The principles of equity, participation and ownership attendant in the Islamic letter of credit structures are likely to create a mismatch for the UCP 600.³³ This part of the chapter picks four areas for consideration.

- The scope of application of the UCP 600
- The principle of autonomy

30 *Mollwo, March & Co v Court of Wards* (1872) LR 4 PC 419. There is a view that the receipt of net profits is not a presumption to rebutted but simply part of the collective of evidence for the court’s inference: see *Walker West Developments Ltd v Emmett* (1978) 252 Estates Gazette 1171. See too M. Blackett-Ord, *Partnership* (4th edn, Bloomsbury, 2012), para. 2.20.

31 English law has not gone as far as Australian law so as to hold that as between the joint venturers there is a duty to account for secret profits (in the absence of constructive trust). See *Murray v Yorkshire Fund Managers* [1998] 1 WLR 951; contrast *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 and *Diversified Mineral Resources NL v CRA Exploration Pty Ltd* (1995) ICCR 6(5) 95–96. See also the Canadian case of *Akman & Son v Chipman* (1988) 45 DLR (4th) 481.

32 Ariel Berschadsky, ‘Innovative Financial Securities in the Middle East: Surmounting the Ban on Interest in Islamic Law’, (2001) 9 U. Miami Bus. L. Rev. 107, 110.

33 And, indeed, other international regulatory systems such as the proposed Basel III regime for bank supervision. Under currently proposed Basel III rules (which are to come into force in 2018), trade finance instruments such as letters of credit, import financing and other trade loans will incur higher capital and funding costs. These costs are imposed via calculations for the leverage ratio, the capital ratio and the liquidity coverage ratio. That means that banks will have to limit their trade finance offerings to meet the required capital adequacy and liquidity ratios. It is obvious that the Bank of International Settlement was concerned about banks becoming overexposed. The problem is that treating Islamic letters of credit as the same as conventional letters of credit for the purposes of the liquidity coverage ratio is arguably inappropriate because unlike conventional letters of credit, Islamic letters of credit are usually considered to be asset-based and should therefore not incur the same capital and funding costs. Regardless, including all letters of credit in the mix is controversial. From a macro-economic perspective, if capital and liquidity requirements on trade finance instruments are not relaxed, banks could choose not to renew them when they mature, deleveraging quickly by pulling credit and negatively impacting trade growth (see J.P. Morgan ‘Basel III Update’ (17 January 2013), p. 2). For this and other reasons, although BIS have not changed these rules in Basel III, the rules which were intended to apply in 2013 were rescheduled to come into force on 31 March 2018, and then the date was further extended to 31 March 2019.

- The principle of strict compliance
- The interest ban

11.3.1 *The scope of application of the UCP 600 and Islamic letters of credit*

At one level, it might be said that Islamic letters of credit are no different from conventional letters of credit as a payment instrument, and as such they could be subject to the UCP 600 and, where necessary, contractual variation or exclusion of some of the provisions of the UCP 600 would be sufficient. Indeed, most Islamic merchant banks offering an Islamic letter of credit service will adopt and apply the UCP 600. It is suggested that a reason for the automatic incorporation of the UCP 600 is because from the banks' perspective, there is simply no suitable alternative – after all, there is no rule framework for Islamic letters of credit. Moreover, a letter of credit is often transacted across the correspondent banking system where not all correspondent banks operate on Islamic terms. Hence, the incorporation of the UCP 600 is to be expected by the correspondent banks. Another reason, it might be ventured, is that banks are familiar with the operation of the technical provisions of the UCP 600 and the ISBP,³⁴ and are creatures of habit. Most banks have procedures and systems in their back offices to deal with the presentment, checking and acceptance or rejection of shipping and commercial documents.³⁵ Deviating from the UCP 600 would mean having to create new procedures and systems to process Islamic letters of credit. Unless the volume of transactions under Islamic trading terms justifies it, banks are not going to be keen to set up a completely new infrastructure for the Islamic payment instrument.

Be that as it may, we argue here that the UCP 600 is not satisfactory for dealing with the Islamic letter of credit.

11.3.2 *Principle of autonomy*

It is trite law that the UCP 600 gives effect to the long cherished principle of autonomy in letters of credit.³⁶ The words of Sir John Donaldson in *Bolivinter Oil SA v Chase Manhattan Bank NA*³⁷ are often cited:

The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that whatever disputes may thereafter arise between him and the

34 The International Standard Banking Practice (ISBP 2013) provides banks with a checklist of best practices for checking documents under the UCP.

35 See research carried out by the UK Financial Conduct Authority 'Banks' control of financial crime risks in trade finance' (TR13/3; July 2013) at section 3. Although the report concerned the procedures banks have in place to tackle financial crime and money laundering, it emphasises the point that most banks have in place proper procedures for dealing with documentary credits and documentary collections.

36 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159; *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233; *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 WLR 393; and *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168.

37 [1984] 1 WLR 393.

bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met.³⁸

As is clear from Art. 4(a) of UCP 600, 'a credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.'

However, as we have seen in the three principal types of Islamic letters of credit, the issuing banks are required, at the very least, to vouch for the Shari'a compliance of the underlying transaction and, indeed, often, are actually a contracting party to a commercial [sale] transaction which has to be Shari'a compliant. Notably, the bank will be implicated in the requirement that the underlying transaction should be *halal*. Indeed, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) states in their Shari'a ruling on documentary credit in Clause (3/1/3):

It is not permissible for the institution to undertake transactions in documentary credit, in accordance with what is stated in item (3/1/2), either for itself or on behalf of another as a client or institution or by way of collaboration, when such credit pertains to goods that are prohibited by the Shari'ah, or is based on a contract that is void or irregular (according to the Shari'ah) due to vitiating conditions or includes interest, either charged or paid, whether explicitly as in the case of loan upon payment by the beneficiary of amounts not fully or partially covered in similar credit, or impliedly, as in the case of discounts or trading (payment) on bills of exchange with deferred and delayed payments.³⁹

The question might be whether a comparison may be made with the illegality exception in letter of credit law. It is argued that there are three significant challenges in applying the illegality defence to Islamic letters of credit. First, English case law on illegality in letters of credit is not settled. There remain a number of gaps in case law which can potentially be problematic for Islamic letters of credit. Second, there is the conceptual and normative difficulty in recognising and enforcing an illegal purpose in a religious law which is not unlawful in English law. Third, there is the practical difficulty of proving unlawfulness.

English case law on when and to what extent an illegal purpose would provide a sufficient defence in a refusal to pay under a letter of credit is quite thin. The first case that dealt with the matter at some length was *Group Josi Re v Walbrook Insurance Co Ltd and Others*.⁴⁰ In that case, it was alleged that a reinsurance contract was illegal because the reinsurers were not authorised to operate in the UK, and, consequently, a letter of credit which was issued to facilitate payment between the relevant parties was similarly tainted and could not be enforced. Staughton LJ held

³⁸ Ibid.

³⁹ (2010) at <http://www.aaofii.com/>.

⁴⁰ [1996] 1 WLR 1152.

that ‘illegality is a separate ground for non-payment under a letter of credit’⁴¹ and commented:

It seems to me that there must be cases when illegality can affect a letter of credit. Take for example a contract for the sale of arms to Iraq, at a time when such a sale is illegal. The contract provides for the opening of a letter of credit, to operate on presentation of a bill of lading for 1000 kalashnikov rifles to be carried to the port of Basra. I do not suppose that a court would give judgment for the beneficiary against the bank in such a case.⁴²

His Lordship explained that the letter of credit is unenforceable not because the letter of credit contracts were themselves illegal, but because they were being used to carry out an illegal transaction.⁴³ Hence, it follows that the unlawful purpose of the letter of credit is an important element in the equation. That said, the judge was unwilling to ‘enter upon a discussion of what is *turpis causa*, or what is taint’.⁴⁴ Instead, His Lordship preferred to rely on the principle in *Bowmakers Ltd v Barnet Instruments Ltd*⁴⁵ stating that the letter of credit would not be enforceable if ‘the plaintiff seeks to, or is forced to, found his claim on an illegal contract or to plead its illegality in order to support his claim’.⁴⁶ Under the circumstances, the claimant in the present case would be bound to found their claim on an illegal contract.

The aversion to ‘tainting’ or ‘*turpis causa*’ is understandable – it raises the twin problems of extent and gravity. How tainted is the party in question? How grave is the illegality in the underlying contract? *Group Josi* also makes it plain that where the letter of credit is integrally bound to the illegal underlying transaction, then it is unlikely not to be enforced. Where the letter of credit is used merely as a secondary instrument in support of an ‘illegal’ transaction, the position is less clear.⁴⁷

In Islamic letters of credit, many *haram* commercial transactions would be considered perfectly acceptable in English law. How should an English court evaluate the gravity of such an ‘illegality’? From a practical point of view, the court could conceivably turn to Shari’a⁴⁸ for guidance. However, Shari’a is not merely law but also a body of religious and moral principles. It can be both impractical and insensitive for an English secular court to delve into that inquiry. It is thus conceivable that where there is too much uncertainty, the English court might oblige itself to avoid the issue on the basis that if the contract was subject to English law, it could not have been the parties’ presumed intention to expect the court to inquire into matters which it is seriously ill-equipped to resolve. In *Shamil Bank*

⁴¹ *Ibid.*, at 1163.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ [1945] KB 65.

⁴⁶ See [1996] 1 WLR 1152, at 1164.

⁴⁷ The issue is dealt with in *Mahonia Ltd v JP Morgan Chase Bank (No.1)* [2003] EWHC 1927 (Comm); [2003] 2 Lloyd’s Rep 911.

⁴⁸ On the question of whether Shari’a could be the relevant applicable law on which the court could rely in testing the illegality, see below.

of *Bahrain v Beximco Pharmaceuticals Ltd*,⁴⁹ when asked to apply the ‘principles of the Glorious Shari’a’ to the loan contract in question, Morison J held:

Whilst in one sense this court will answer any question posed to it, however difficult, it is improbable in the extreme, that the parties were truly asking this court to get into matters of Islamic religion and orthodoxy. This is especially so when the bank has its own religious Board to monitor the compliance of the bank with the Board’s own perception of Islamic principles of law in an international banking context.

So far as the bank was concerned, that is likely to have been sufficient for its own regulatory purposes but there is no suggestion that the defendants were in any way concerned about the principles of Shari’a law either at the time the agreement was made or at any time before the proceedings were started. The Shari’a law defence is, I think, a lawyer’s construct, but for the reasons I have given, in my view it does not work.⁵⁰

In other words, ‘having chosen English law as the governing law, it would be both unusual and improbable for the parties to intend that the English court should proceed to determine and apply the Shari’a in relation to the legality or enforceability of the obligations clearly set out in the contract’.⁵¹ Reference to the parties’ presumed intention and the avoidance of uncertainty are tools the English court can rely on to sidestep the issue. It is, however, open to the criticism that the English courts are not prepared to facilitate Islamic commerce when the relevant principles commonly associated with the lawfulness of the commercial transaction are not wildly controversial. Indeed, in *Beximco*, the appellants argued that the principles in issue, namely, the proscription of *riba* and the essentials of a valid *murabahah*, were not controversial. Although that argument was rejected by the Court of Appeal, there is some good basis for suggesting that an English commercial court should not too promptly dismiss a matter of Shari’a without *prima facie* evidence of uncertainty.⁵² It might also be suggested that with appropriate expert evidence, the extent or gravity of an offence in Shari’a could be tested.

However, Shari’a is not synonymous with the cultural norms and mores of the Islamic countries from which the parties are established. There may thus also arise the question as to what is harm, and its seriousness, in relation to particular cultures, communities and trades. For example, in some countries, the prohibition against alcohol might be stricter than others. That is far more problematic than evaluating the question of gravity of the offence in the eyes of Shari’a. The alternative is not to inquire into gravity but, if *Group Josi* represents the correct legal position, in terms of English law, whether illegality can be a sufficient defence in the drawdown of a letter of credit does depend on that very inquiry.

In the longer term, it is likely that the problem of uncertainty could gradually resolve by itself as Islamic trade finance continues to establish itself and we encounter greater transnational convergence of the different socio-economic and cultural norms associated with Islamic finance. The emergence of a transnational body of

49 [2003] EWHC 2118 (Comm); [2003] 2 All ER (Comm) 849 (on appeal [2004] EWCA Civ 19; [2004] 1 WLR 1784).

50 [2003] EWHC 2118 (Comm); [2003] 2 All ER (Comm) 849 at [54]–[55].

51 [2004] EWCA Civ 19; [2004] 1 WLR 1784 at [54] (Potter LJ).

52 That is not to say that there should be a mini-trial to test the evidence.

norms and standards would negate the need to refer back to any domestic cultural groupings.

In an attempt to protect its interest, the bank may insist on a certificate to be issued by a *halal* certification panel⁵³ attesting to the lawfulness of the goods. Some Islamic banks will require the production of a certificate issued by an appropriately constituted body from the exporting country, whilst others rely on their own supervisory regulator⁵⁴ for a legally binding list of *halal* goods and products.

A related question is whether the Islamic bank is permitted to exclude or limit their exposure to the underlying transaction. It is probably safe to say that all the five Islamic schools of thought prohibit the exclusion of obligations which are fundamental to the contract;⁵⁵ the full implications of the prohibition differ from school to school.⁵⁶ It is outside the scope of this paper to explore Islamic contract law principles. It suffices to say that Islamic banks would find it difficult to protect their legal exposure using contractual devices even if the letters of credit are expressed to be governed by English law.

11.3.3 *Recognising unlawfulness in Shari'a*

It has been pointed out that Shari'a is not considered, at least in the context of the Rome Convention (and, likely, its successor, the Rome I Regulation), to be law. As such, it would follow that in the light of *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd*,⁵⁷ an English court would not be able to consider any Shari'a proscriptions unless these have been incorporated into the contract as terms of the contract. The court, however, may be amenable to construing the contract in the spirit of the Shari'a proscriptions where the express contract terms are not obviously inconsistent with those Islamic principles.⁵⁸

Where the contract is expressed to be governed by an applicable law of a country which gives force to Islamic principles,⁵⁹ the English court should be able to enforce the applicable law choice. However, this could potentially raise the issue of illegality under a foreign law. In *Mahonia Ltd v J.P. Morgan Chase Bank (No. 1)*⁶⁰ the illegality alleged to have tainted the letter of credit was only an illegality in the eyes of US law, but not English law. The bank, moreover, pleaded that as it was tainted

53 See for example the Halal International Authority (<http://www.halalint.org/index.php/en/aboutus.html>).

54 In Malaysia, for example, a list is published by the Central Bank (Bank Negara Malaysia, 2009, Guidelines on Accepted Bills-i – Table A).

55 See M. Mansoori, 'Is "Islamic Banking" Islamic? Analysis of Current Debate on Shari'ah Legitimacy of Islamic Banking and Finance' (2011) 50 Islamic Studies 383, at p. 410.

56 There are differences as to the effect and nature of the prohibition – ranging from the types of transactions subject to the prohibition, to whether the unlawful exclusion clause could be severed and whether the entirety contract should fail for reason of the exclusion.

57 [2004] EWCA Civ 19; [2004] 1 WLR 1784.

58 Using the 'factual matrix' approach to the construction of contracts; see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913, as further explained in *Bank of Credit & Commerce International SA (In Liquidation) v Ali* [2002] 1 AC 251, 269.

59 For example, if the letter of credit provides that it is subject to Saudi law rather than Shari'a law.

60 [2003] EWHC 1927 (Comm); [2003] 2 Lloyd's Rep 911.

by a foreign illegality, it was unenforceable on grounds of English public policy. The High Court found that the ‘letters of credit were created for the purpose of forming part of the basis of a transaction (the swaps) which were [sic] illegal under United States law because they had an illegal purpose’.⁶¹ The court appears to suggest that it was not material whether the purpose was unlawful under foreign law, rather than English law.⁶² Colman J said, ‘it must logically be just as contrary to public policy to enable the claimant to enforce a contract which has been entered into for a foreign illegal purpose known only to himself as to enable him to enforce such a contract the purpose of which is known to both parties to it’.⁶³ However, the illegality alleged must be sufficiently serious; as Colman J said:

there is much to be said for the view that the public policy in superseding the impregnability of letters of credit where there is an unlawful underlying transaction defence may not be engaged where the nature of the underlying illegal purpose is relatively trivial, at least where the purpose is to be accomplished in a foreign jurisdiction.⁶⁴

The judge, however, left open the question as to whether and to what extent the seriousness of the illegality is to be tested – namely, do we apply English sensibilities or foreign sensibilities or both?

11.3.4 Autonomy and the bank as legal buyer

Last, but not least, is the issue as to whether the principle of autonomy applies at all in those Islamic letters of credit where the bank is the legal buyer. It is trite principle that the ‘bank deals with documents and not with goods, services or performance to which the documents may relate’.⁶⁵ Can the Islamic bank rely on its status as buyer and reject a documentary tender arguing that there was a breach of the sale contract itself (such as defective goods)?

There are two dimensions to the question. First, from the practical viewpoint, the problem may not be as acute as it first appears. Most Islamic letters of credit will enter the correspondent banking system, which means that the seller is unlikely to be presenting the documents to the issuing bank, but to a confirming or nominated bank. It is submitted as between the nominated bank and issuing bank, the relationship is a straightforward interbank payment arrangement. As between the beneficiary and the nominated bank, again this is no more than a conventional letter of credit arrangement. No sale is involved in either case. Hence, the issuing bank is duty-bound to reimburse the nominated bank as long as the documents are in conformity.⁶⁶

A difficulty may arise when the presentment is made directly to the issuing bank, because the bank seemingly could be operating in two capacities – as issuing bank

61 [2003] EWHC 1927 (Comm); [2003] 2 Lloyd’s Rep 911 at [13].

62 See also *Regazzoni v KC Sethia Ltd* [1958] AC 301, where the House of Lords held that a contract of sale was not enforceable because it was entered into to contravene an Indian law which prohibited the export of Indian-produced goods to South Africa.

63 [2003] EWHC 1927 (Comm); [2003] 2 Lloyd’s Rep 911 at [29].

64 *Ibid.*, at [68].

65 Art. 5 UCP 600.

66 Art. 7 UCP 600.

and as legal buyer. At one level, it is ventured that an analogy might be drawn from the position of a buyer in a documentary sale. In the case of a CIF buyer, they pay against conforming documents and are then free to sell or dispose of the goods by means of the bill of lading. By paying, the buyer is not precluded from subsequently rejecting the goods or recovering damages for breach of the contract of sale if on examination the goods are found to be non-conforming.⁶⁷ It is argued that such analogy has the advantage of clarity; the rights and obligations of a buyer in a documentary sale are well known. From a legal perspective, it is difficult to see any real objections on principle given that the Islamic bank in question is indeed the legal buyer and the contract called for payment against conforming documents.

11.3.5 *Principle of strict compliance*

In conventional documentary credit law, the principle of autonomy finds further manifestation in the principle of strict compliance. Because the bank does not wish to deal with goods, services or performance to which the letter of credit relates,⁶⁸ it has to be satisfied with evidence from the documents that the underlying contract had been properly performed so as to trigger the payment obligation. Hence, the documents must be strictly in conformity to the documentary conditions set out in the letter of credit. However, as the principle of autonomy would be compromised by the Islamic letter of credit, it is also conceivable that the principle of strict compliance might be affected.

It can be said that the question of strictness jars with Islamic law sensibilities. It has been said by one commentator that:

We recommend that discrepancies be approached from the standpoint of their seriousness and that minor discrepancies be distinguished from major discrepancies. This must be done in the context of a fair and reasonable evaluation to the harm the discrepancy does to the business transaction.⁶⁹

Clearly, any concession to ‘minor’ discrepancies not covered by the ISBP⁷⁰ or the UCP 600⁷¹ would be contrary to international documentary credit practice. Despite

⁶⁷ Hence the commonly quoted observation by Roche J in *Schmoll Fils & Co Inc v Scriven Bros & Co* (1924) 2 Ll L Rep 118 at 119 that the CIF contract involves three stages of delivery, ‘provisional delivery’ on shipment, ‘symbolical delivery’ on tender of the documents, and ‘complete delivery’ when the goods are handed over to the buyer.

⁶⁸ Art. 5, UCP 600.

⁶⁹ A. Lahsana, *Implementation of the Islamic Letter of Credit in International Trade* (undated) (paper held by the Malayan Banking Corp) (http://www.maybank2u.com.my/iwov-resources/islamic-my/document/my/en/islamic/scoe/knowledge-centre/research-paper/Islamic_Letter_of_Credit.pdf).

⁷⁰ As to what constitute minor or acceptable discrepancies, see for example the provisions of Rule A23, Rules C1–C14 (as to the information in the invoice), Rules E20–E27 (information in the bill of lading), G20–G24 (information contained in a charterparty bill of lading), etc. of ISBP 745 (2013).

⁷¹ Art. 14(d) provides: ‘Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated documents or credit.’ Note also Evans LJ’s dictum ‘... the requirement of strict compliance is not equivalent to a test of exact literal compliance in all circumstances and as regards all documents.’ To some extent, therefore, the banker must exercise his own judgement whether the requirement is satisfied by the documents presented to him’ (*Karaganda Ltd v Midland Bank Plc* [1999] CLC 1108 at [12]).

the relaxation of the strict compliance rule by the UCP 600 (in contrast to the UCP 500)⁷² and the introduction of the practice of ‘conditional refusal’,⁷³ there is no doubt that the threshold as to what is ‘minor’ remains quite strict.⁷⁴

It is also important to bear in mind that where the bank is the buyer or the buyer’s representative, the shipping documents relating to the goods should ideally be in the name of the bank for account of the customer, and not in the customer’s name alone.⁷⁵ That qualification will need to be expressly incorporated in the credit.

What has troubled Islamic traders and commentators more, it seems, is the issue of discrepancy fees.⁷⁶ They tend to view the discrepancy fee as a form of penalty and, like English law on penalties,⁷⁷ consider it a sum *in terrorem* and thus immoral and unethical. Of course, discrepancy fees are condemned and decried by many merchants, whether Islamic or not.⁷⁸ It should of course be pointed out that the UCP 600 does not expressly provide for the imposition of such fees.

11.3.6 *The interest ban*

The imposition of interest arises in three contexts, generally.

- As between the negotiating bank and the beneficiary
- As between the issuing bank and the applicant
- As between the relevant banks

(a) Between the negotiating bank and the beneficiary

The negotiating bank treats the payment given to the beneficiary on the back of a letter of credit as an advance (loan), and interest on the amount is charged from

⁷² Art. 14(d) (*ibid.*) is considered to be an improvement from the former art. 13(a) UCP 500 which stated that documents which were ‘inconsistent with one another’ would be treated as non-compliant.

⁷³ Art. 16 entitles the bank to refuse to honour the draft under a letter of credit if the presentation of the documents is not compliant but it must notify the presenter by giving a notice of refusal. The notice must be given by telecommunication or by any expeditious means no later than the close of the fifth banking day following the day of presentation. See R. Langerich, ‘An Improved UCP that Has Solved Many Problems’, DC INSIGHT, January–March 2007, at p. 3; also *Fortis Bank SA/NV v Indian Overseas Bank* [2011] EWCA Civ 58; [2011] 2 Lloyd’s Rep 33 on how Art. 16 is to be interpreted and applied.

⁷⁴ For an example of this, see *Fortis Bank SA/NV v Indian Overseas Bank* [2009] EWHC 2303 (Comm); [2010] 1 Lloyd’s Rep 227, esp. at [53].

⁷⁵ See for example Kuwait Finance House Shari’a Legal Opinion No. 69, p. 24, and Qatar Islamic Bank Shari’a Legal Opinion No. 48, p. 19.

⁷⁶ See for example R. Che Hashim & A. Abdul Aziz, *Islamic letter of credit: An Overview of Legal and Shari’ah Issues* (2009) (conference paper) at [http://eprints.um.edu.my/9456/1/Islamic_letter_of_credit_\(LC\)_An_overview_on_legal_and_shari’ah_issues.pdf](http://eprints.um.edu.my/9456/1/Islamic_letter_of_credit_(LC)_An_overview_on_legal_and_shari'ah_issues.pdf); also A. Lahsana, *Implementation of the Islamic letter of credit in International Trade* (2007) (conference paper) at http://www.maybank2u.com.my/iwov-resources/islamic-my/document/my/en/islamic/scoe/knowledge-centre/research-paper/Islamic_Letter_of_Credit.pdf.

⁷⁷ It should be pointed out that the English courts have been gradually relaxing the strictures on penalties, and are more prepared to accept the fact of the agreement especially where there is good commercial justification for it. See in particular the Supreme Court’s decision in *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2015] 3 WLR 1373.

⁷⁸ M. Schaeffer (ed.), *International Credit and Collections: A Guide to Extending Credit Worldwide* (2001), p. 221.

the date of payment to the date it is reimbursed. Where the reimbursement takes time, the beneficiary may end up having to pay interest to the bank.

In conventional trade finance, the beneficiary may seek to discount or negotiate an appropriately issued bill of exchange which has been accepted according to the tenor of the letter of credit. However, discounting is not seen universally by Islamic systems as lawful. As the State Bank of Pakistan makes clear:

In the event the '*Qard-e-Hasanah cum Wakalah*' model is used for [foreign] bill discounting, it shall be ensured that the agency fee charged for collecting the proceeds of the bill is based on 'Ujratul Mithl (market fee)' and shall not be linked to the bill amount and the tenor etc.⁷⁹

The imposition of an agency fee must reflect the service provided; that makes such a 'discounting' highly unattractive for banks. This is a case of where conventional commercial expectations are not consistent with Islamic principles, and vice versa.

(b) Between the issuing bank and the applicant

There are three possible scenarios:

- (i) The letter of credit is issued against 100 per cent cash by the applicant.
- (ii) The bank issues the letter of credit 100 per cent against a credit facility extended by it to the importer ('nil coverage').
- (iii) The bank issues the letter of credit less than 100 per cent against a credit facility extended by it to the importer covering that amount ('partial coverage').

In (i) where there is no credit, no interest is charged. It thus follows that (i) is entirely permissible under Shari'a. There is, however, the matter of the payment of a commission and charges. These fees and payments are lawful in Islam because they are consideration for services rendered. Commissions are collected for the initiation and amendment of an Islamic letter of credit. Subject to the terms of the relevant agreements, commissions and charges (such as handling charges, SWIFT charges etc.) can be collected in advance or in arrears, periodically or non-periodically. The service provider is also permitted to choose to accrue commissions at a regular frequency (daily, monthly, quarterly, half-yearly or annually). Similarly, the frequency of liquidation of periodic commission can be varied. The commissions and charges can be collected from any party and, if necessary, debited from a receivable account and liquidated subsequently.⁸⁰

In the other two situations, the interest element will need to be absorbed in the profit element in the underlying contract structure, namely, the *murabahah*, *musharakah* or *wakalah*.

There is also the problem of transit interest for the applicant. In a conventional letter of credit, the issuing bank is likely to charge the applicant transit interest for the period of time when the bank is out of funds (namely, between the time

⁷⁹ IBD Circular No. 02 of 2014 (3 April 2014).

⁸⁰ See the technical manual produced by ORACLE, an IT services provider, 'Islamic Letters of Credit Oracle FLEXCUBE Universal Banking Release 11.3.0' (May 2011) Oracle Part Number E51535-01, para. 2.1.9.

payment is made by the reimbursing bank to the beneficiary and the time the issuing bank is paid by the buyer). Islamic banks are therefore generally banned by their Shari'a Boards of Supervision from charging (and paying) transit interest. Such a derogation must therefore be properly incorporated into the relevant contracts.

(c) Between the relevant banks

Article 13(b)(iii) of UCP 600 provides that 'an issuing bank will be responsible for any loss of interest, together with any expenses incurred, if reimbursement is not provided on first demand by a reimbursing bank in accordance with the terms and conditions of the credit'. That refers usually to the liquidated damages claimed by the reimbursing bank for delay caused by the issuing bank in paying the reimbursing bank (either the negotiating bank or the confirming bank).⁸¹

At the heart of the matter is whether Islamic banks should be involved in the provision of credit (as against finance) at all.⁸² Therein lies the challenge for Islamic banks and merchants seeking to use the UCP 600 for Islamic letters of credit. The UCP 600 is contractual by nature, which means the relevant parties should be free to exclude the application of Art. 13(b)(iii), but for the reimbursing bank, the dilemma is how it can best protect its interests⁸³ if that article is to be removed. Perhaps the answer does not lie in the law – it is in essence a commercial decision. Within the Islamic banking circles, there has been much discussion about the establishment of an Islamic correspondent banking network so that by mutual consent the imposition of interest (including transit interest) could be abolished.⁸⁴ That, it has to be said, is not a complete solution, but it is an attempt to make the conventional correspondent banking system work without *riba*. The Islamic correspondent banking system will require the issuing banks to hold a reasonable amount of cash in their current accounts with the correspondent banks. They will also promptly correct any debit balance in their accounts with the correspondent bank. The correspondent bank, in turn, will not charge any temporary or transit interest in lieu of its liberty to use the credit balances deposited by the issuing bank without paying any compensation to the issuing bank. As a form of partial security, the correspondent bank which acts also as a confirming bank would debit the issuing bank only with a certain pre-agreed 'cash margin' so that the issuing bank only needs to maintain a credit balance with the correspondent bank sufficient

81 Where the issuing bank is unable to pay the negotiating bank through the confirming bank, that can also attract transit interest. The interest is charged for the period between the time the reimbursing bank pays the beneficiary and the time it is reimbursed.

82 See arguments in M. Kahf, *The Islamic Economy: Analytical Study of the Functioning of the Islamic System* (The Muslim Students' Association of The United States and Canada, 1987); and M. Ali Al-Jarhi, 'A Monetary and Financial Structure for an Interest-Free Economy' in Z. Ahmad et al. (eds.), *Money and Banking in Islam* (Jeddah, International Center for Research in Islamic Economics, K.A.U., 1983).

83 Including also the opportunity cost when the bank is out of pocket for the relevant duration of time. 'Interest' is an effective means to provide for the loss of an economic or financial opportunity; the removal of interest would leave the bank financially worse off.

84 See IMF Working Paper No. 08/16, 'Islamic Banks and Financial Stability: An Empirical Analysis,' by M. Čihák and H. Hesse (<https://www.imf.org/external/pubs/ft/survey/so/2008/RES051908A.htm>).

to cover the cash margins of the letters of credit and not the whole value of those letters of credit.⁸⁵ Hence, both banks' exposure, despite the removal of *riba*, is limited.

11.4 Conclusion

This paper has sought to clarify the workings of the Islamic documentary credit system and to demonstrate the conflicts between that system and the conventional legal framework for letters of credit. At first blush there are two possible solutions – integration or isolation/separation. Both are problematic. Integration is never going to be entirely satisfactory because the values are manifestly different. In the Western system, the banks are to stand at arm's length from the underlying mercantile relationship and credit (as is starkly explicit in the term 'letter of credit'). That is controversial in Shari'a. Isolation/separation is also not ideal. The desire to raise and spread wealth, and develop, is an aspiration common in both Islamic and non-Islamic countries. Prevailing economic theory⁸⁶ is that sustainable international trade⁸⁷ helps poor countries develop and increase wealth. The realities of a globalised trading system make it impossible for an isolationist scheme to achieve those aims. By a similar token, the exclusion by Western banks of this large sector in global trade would be a serious lost opportunity.

A more pragmatic solution is called for – through private contractual devices⁸⁸ and a proper understanding of the points of conflict and commonality between the UCP 600 system and Islamic documentary credit system, a compromise can be had. It is entirely consistent with the nature of the UCP 600 which purports to be global in reach but contractual in essence between the relevant parties. The ICC, which claims to be 'the world business organisation',⁸⁹ can do much not only to include Islamic documentary credit practices in its future revisions of the UCP but also to help educate and train international trade professionals in this emerging trade finance solution.

⁸⁵ See H. Rahim, *Islamic Banking: Conceptual Framework and Practical Operations* (IPS, 1992), pp. 13–14; also A. Faruq Ahmad, *Developments in Islamic Banking Practice: The Experience of Bangladesh* (Universal, 2010), p. 94.

⁸⁶ Primarily, the idea that free market, trade liberalisation, open competition and sustainability policies contribute to wealth creation. See, for example, the articles of association of the International Monetary Fund (<http://www.imf.org/external/about.htm>) and the commentaries issued by the IMF senior staff and economists (<http://www.imf.org/external/news/default.aspx?vc>). The IMF has 188 country members, which it may be reasoned, subscribe in *varying degrees* to these free market principles.

⁸⁷ This is not the place to examine what it means by 'sustainable', a concept both in law and economics that will continue to prove controversial.

⁸⁸ Such as the Islamic correspondent banking arrangements discussed above.

⁸⁹ The ICC adopts the strapline, 'We are the world business organization' and declares its values in these terms: 'ICC strives to ensure that the emerging new world, with new poles of power and leadership, stays faithful to the precept that international trade and investment and the market economy system are key factors in raising and spreading wealth' (<http://www.iccwbo.org/about-icc/organization/>). It goes without saying that the Islamic trading world is not insignificant by any standards and is very much an integral part of the emerging new world of international trade.

CHAPTER 12

Do I want my documents back? A documentary credit dilemma

*Stuart Shepherd**

12.1 Introduction

The background to this paper is a judgment handed down by the Court of Appeal in October 2014 in the case of *The Erin Schulte*.¹ The case raises and deals with a number of issues which arise in the not-uncommon situation where a bank wrongly rejects (that is dishonours) a valid presentation under a letter of credit (LC). In particular, the case –

- (a) provides a salutary lesson in relation to the dangers of the common practice in the oil trade of issuing Letters of Indemnity (letters of indemnity) to facilitate the discharge of cargo other than against presentation of bills of lading;
- (b) clarifies the status of bills of lading indorsed to the LC issuing or confirming the bank as part of a presentation under a LC; and
- (c) clarifies the options open to the beneficiary upon dishonour of the LC and the consequences of a beneficiary's election as to how to proceed in the face of such dishonour.

12.2 The facts of *The Erin Schulte*

In April 2010, Gunvor International BV agreed to sell a cargo of gasoil to United Infrastructure Development Corporation (UIDC), CIF Takoradi, Ghana. UIDC purchased the goods in order to meet a contract they had entered into with Cirrus Oil Ltd. Both contracts provided for payment by LC. United Bank of Africa (UBA), at the request of Cirrus, opened a LC in favour of UIDC which was confirmed by Standard Chartered Bank (SCB). That LC was subject to the UCP 600.

The LC was then transferred by SCB to Gunvor. Gunvor appointed Société Générale (SG) to act as its agent for the purpose of drawing under the transferred LC.

Gunvor shipped the goods in two parcels from Cotonou, Benin. The first parcel was shipped on board the *Maria E* and the second parcel on board the *Erin Schulte*. Following discharge of the *Maria E*, issues arose as to whether the cargo met the

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¹ *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2014] EWCA Civ 1382; [2015] 1 Lloyd's Rep 97.

contract specification. However, Cirrus ultimately accepted the cargo and payment was subsequently made to Gunvor through the LC. However, Cirrus declared it was not prepared to take the cargo on the *Erin Schulte*, and a request was made through the banking chain to amend the LC so as to prevent any presentation in respect of the shipment on board the *Erin Schulte*. Unfortunately, SCB confirmed agreement to such amendment without obtaining the consent of the beneficiary under the LC, i.e. Gunvor. It was this mistake which was the genesis of everything that followed.

In the meantime, UIDC, whilst purporting to reject the cargo (which rejection was not accepted by Gunvor), found new buyers to take the cargo on the *Erin Schulte*. On 4 June 2010, Gunvor presented documents in respect of the cargo on board the *Erin Schulte* to SCB under the LC. That presentation included a set of bills of lading covering the cargo on board the *Erin Schulte* indorsed in favour of SCB. On 9 June 2010, SCB informed SG that the documents did not comply with the LC and it was holding them to SG's order. Discussions followed between SCB, SG and Gunvor, with Gunvor continuing to insist that the presentation was valid and SCB continuing to maintain the contrary. Also on 9 June, the *Erin Schulte* arrived at Takoradi. In the absence of the bills of lading being available for presentation to the carrier, the cargo was discharged between 15–19 June 2010 against a letter of indemnity issued by or on behalf of Gunvor and delivered to new end buyers/receivers. Gunvor continued to insist that the documents presented on 4 June 2010 complied with the LC and pressed SCB for payment but to no avail.

Here the author must declare his interest because it was at this point that Gunvor instructed the author's firm, Ince & Co LLP, to assist them in seeking to obtain payment from SCB. This led, on 1 July 2010, to Gunvor commencing proceedings against SCB claiming the sums due under the LC in debt and/or as damages. Very shortly after service of those proceedings on 7 July 2010, SCB capitulated and, following discussions between SCB's and Gunvor's respective solicitors, paid the full amount due under the LC together with interest and costs. Throughout these events the documents, including the bills of lading, which had been presented to SCB remained physically with SCB.

But for SCB mistakenly confirming, without Gunvor's consent, the amendments to the LC and essentially cancelling the balance which could be drawn under the LC, that is where matters would have come to rest, with SCB seeking reimbursement from UBA.

Almost one year later, and no doubt after having agonised over the legal and commercial consequences of doing so, SCB knocked on the door of the owners of the *Erin Schulte*, tendered the bills of lading and demanded delivery of the cargo. Of course, the cargo had long been discharged in Ghana against the letters of indemnity issued by Gunvor as described above. Consequently, the owners in turn knocked on Gunvor's door and asked Gunvor to take over the defence of the claim, and ultimately the proceedings, that had been brought against them by SCB and to indemnify them in respect of the claim and the costs associated with it. Gunvor agreed to take over and conduct the owners' defence to SCB's claim and, once again, turned to Ince & Co to defend their interests.

12.3 A word on the use of letters of indemnity in respect of discharge of cargoes without presentation of bills of lading

Before looking at the issues raised in *The Erin Schulte*, I will dwell for a moment on the use of letters of indemnity issued to obtain delivery of cargoes without presentation of bills of lading. As we know, amongst other things, the bill of lading is a document of title. The principle that underpins that function is that the carrier must only deliver the cargo concerned against presentation of the original bill. Consequentially, if you are the lawful holder of the bill of lading, you are entitled to possession of the goods at the delivery point identified in the bill against presentation of the bill. If, in breach of the bill of lading contract, the carrier delivers the cargo to a third party, other than against presentation of the original bill of lading, the lawful holder of the bill will have a claim in damages against the carrier for breach of contract, and possibly also for conversion, for the value of the cargo.

It is a fairly established practice, at least in the oil trading world, for cargoes to be delivered without presentation of the respective bills of lading but against a letter of indemnity. Such letters of indemnity are normally given by the charterers of the carrying vessel who are often the sellers of the cargo concerned or associated with them. Such letters of indemnity are used because cargoes reach their destination before the bills of lading relating to the cargo have reached the end receiver. As a consequence, the party taking delivery of the cargo at the discharge port is unable to present the bills of lading. In most cases, the bills of lading will still be somewhere in the banking chain when the vessel arrives at the discharge port – even if the chain of sale and purchase contracts is not a particularly long one. So common is this practice that often little or no effort is made to expedite the transfer of the bills of lading through the chain of banks and traders involved. This is because traders work on the basis that cargoes can usually be readily discharged from vessels against letters of indemnity, so the bills of lading themselves are not particularly important in terms of organising delivery.

A lot has been said and written in the past in relation to the risks to carriers of accepting such letters of indemnity and delivering cargoes against them, the principal danger of course being the strength of the security provided by such letters of indemnity in circumstances where the value of the cargoes being delivered are extremely high. As we know, whilst P&I clubs recommend certain letter of indemnity wordings to their members, under the clubs' rules no cover is provided by the carrier for claims for wrongful delivery without presentation of bills of lading.

Less has been said or written in relation to the risks undertaken by those who issue such letters of indemnity. Often traders take the view that if they have a LC and are confident that they have made, or will be able to make, a good documentary presentation under the LC, there is no risk of not getting paid and it is therefore safe to issue a letter of indemnity. That is a dangerous assumption to make. As the *Erin Schulte* case illustrates (see further below), whilst a trader might have a good LC and compliant documents, and indeed may obtain payment under the LC, if there is a breakdown in the banking chain and the bills are not ultimately delivered to the end receiver, the issuing or confirming bank might seek to enforce the security they have by virtue of being holders of the bills of lading by requiring delivery of

the cargo to them. This, of course, will result in a claim against the carrier and, in consequence, a claim over by the carrier under the letter of indemnity. Equally, the trader might discover that their confidence in the documents they have for presentation under the LC is misplaced and that a minor discrepancy, which cannot be corrected, prevents from drawing down under the LC. In those circumstances, whilst they will retain constructive possession of the goods by remaining holders of the bills of lading, the bills will be of no value to them. This is because any claim they were then to make against the carrier for delivery of the cargo without production of bills of lading will rebound on them under the letter of indemnity.

It would be unrealistic to suggest that traders should never issue letters of indemnity, as this would inevitably result in long delays at the discharge port whilst the bills of lading wend their way through the banking chain and, in the meantime, huge demurrage bills are run up. One way to seek to reduce the risk involved in issuing letters of indemnity is for the trader concerned to obtain a counter-indemnity from their buyer so that if a call is made under the letter of indemnity issued by them, they can pass that claim down the chain. This could be done by including a term in the underlying sale contract providing that, in the event that the seller issues such a letter of indemnity, or is asked to do so by the buyer, the buyer will indemnify the seller in respect of the liability under such a letter of indemnity. The seller in such circumstances will still run the risk of the strength of security provided by the buyer's counter-indemnity, but it would be better than having no counter-security at all.

12.4 The issues arising out of *The Erin Schulte* judgment

Turning to the issues in the *Erin Schulte* case, the claim made by SCB was that they were the lawful holders of the bills of lading and that the owners were in breach by delivering the cargo other than to them as holders of the bills. The central issue in the case was whether SCB ever became the lawful holders of the bills of lading. Technically, SCB ran three alternative cases as to how they became holders of the bills. The author does not propose to dwell on the second alternative which was dismissed at first instance by Teare J and was not run in the appeal. The two principal arguments were that SCB became the holders of the bills of lading either (a) when the indorsed bills were first presented to them by SG on Gunvor's behalf or (b) when they paid the amount properly due under the LC following the settlement or, as SCB preferred to describe it, their capitulation following the issue by Gunvor of proceedings against them seeking payment under the LC.

The relevant provisions of the Carriage of Goods by Sea Act 1924 (the Act), which deals with title to sue under, *inter alia*, bills of lading are contained in ss. 2 and 5. Section 2 provides (as far as material):

- 2-(1) Subject to the following provisions of this section, a person who becomes –
 - (a) the lawful holder of a bill of lading; . . .
 shall (by virtue of becoming the holder of the bill . . .) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

- (2) Where, when a person becomes a lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill –
- (a) by virtue of a transaction effected in pursuance of any contractual or other arrangement made before the time when such a right of possession ceased to attach to possession of the bill; . . .

Section 5(2) of the Act provides as follows:

References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say –

- (a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
- (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

Teare J, at first instance,² held that SCB had become the holder of the bills of lading on 4 June 2010 when they were presented at its counters under the LC, and so it acquired the right to sue at that date. In the alternative, he held that SCB had become the holder of the bills of lading on 7 July 2010 when it paid Gunvor. The owners (through Gunvor) sought and obtained permission to appeal against both of those conclusions, and the matter proceeded to the Court of Appeal.

12.4.1 Completion of indorsement by delivery

Leaving aside the fact that one might think it odd that there could be a completion, by delivery of a bill of lading, of any indorsement of a bill in circumstances where the presentation of that bill was rejected, the consequences of Teare J's finding, if they had remained unchallenged, could have led to real practical difficulties. First and foremost, if the indorsement of a bill is completed by mere physical delivery as Teare J found, it would be insufficient for the bank rejecting a presentation to say, as SCB did in the *Erin Schulte* case, that they were holding the bill of lading to the presenter's order. This is because the indorsement having been completed on mere physical presentation, it would be necessary for the bank to re-indorse the bill back to the party who had indorsed it to them. Whether a bank has any obligation to re-indorse a bill of lading in those circumstances is a moot point, and one can imagine that many banks would refuse to do so for fear of somehow taking on liabilities in doing so. In circumstances where a bank refused to re-indorse the bills, the bills would remain in limbo and the presenting party could not regain their entitlement to delivery of the cargo represented

² See *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2013] EWHC 808 (Comm); [2013] 2 Lloyd's Rep 338.

by the bill. Further, logically where payment is made against a direct presentation of documents to the buyer under a cash against documents transaction, the buyer receiving the bill indorsed in their favour would become the lawful holder of the bill of lading upon such presentation and, if unscrupulous, could ‘make off’ with the bill and ultimately the cargo represented by it without paying. This is because it would, despite not having paid for the goods, become the lawful holder of the bill and entitled to demand delivery of the cargo from the carrier.

On appeal,³ the Court of Appeal considered the decision in *The Aegean Sea*,⁴ which was the only previous authority which had considered s. 5(2)(b) of the Act in any detail, and *East West Corporation v DKBS 1912*,⁵ upon which Teare J had placed significant reliance despite being a case concerned with s. 5(2)(a) rather than s. 5(2)(b) of the Act. The author does not propose to analyse those cases here or, indeed, refer to the views that had been expressed on the operation of s. 5(2)(b) by various commentators in the leading texts. In relation to this issue, it is sufficient to record that the Court of Appeal took a different view on this issue to that taken by Teare J. Moore-Bick LJ, who gave the leading judgment in the Court of Appeal, concluded that:

In my view completion of an indorsement by delivery requires a voluntary and unconditional transfer of possession by the holder to the indorsee and an unconditional acceptance by the indorsee. In the present case, Société Générale made an unconditional tender of the bill of lading to SCB on behalf of Gunvor but SCB declined to accept it and held the bill to the order of Société Générale. As a result, the indorsement was not completed by delivery on 4th June 2010 and the judge was wrong so to hold.⁶

12.4.2 Payment under the ‘settlement’

As indicated above, it was SCB’s alternative case that they became holders of the bills of lading when they paid Gunvor following Gunvor commencing proceedings against them. In this context, SCB conceded, probably unnecessarily, that at the point that they paid Gunvor, the bills were ‘spent’; i.e. they no longer gave a right to possession of the goods because they had been discharged. As a result, they took on the burden of bringing themselves within s. 2(2)(a) of the Act. They argued that SCB became the holder of the bills by virtue of a transaction (the payment) which was effected in pursuance of a contractual or other arrangement, namely their confirmation of the LC, which occurred before the bill became ‘spent’ upon delivery of the cargo at Takoradi. The argument between the parties was therefore whether the payment was made pursuant to or under the confirmation of the LC, which predated discharge, or whether it was made, in essence, pursuant to a settlement of the litigation commenced by Gunvor against SCB which post-dated delivery.

³ *The Erin Schulte* [2014] EWCA Civ 1382; [2015] 1 Lloyd’s Rep 97.

⁴ *Aegean Sea Traders Corporation v Repsol Petroleo SA (The Aegean Sea)* [1998] 2 Lloyd’s Rep 39.

⁵ *East West Corporation v DKBS 1912* [2002] EWHC 83 (Comm); [2002] 2 Lloyd’s Rep 222.

⁶ [2014] EWCA Civ 1382; [2015] 1 Lloyd’s Rep 97 at [28].

The Court of Appeal approached this question in a rather different way than Teare J had at first instance. It observed that, at the time of concluding the proceedings between SCB and Gunvor under the LC on the terms agreed between the parties, there was no discussion or agreement as to the status of the bills of lading, which at that time remained in the physical possession of SCB but were held to the order of Gunvor through SG. Moore-Bick LJ observed that:

In the absence of any unequivocal demand by Gunvor for payment against acceptance of the documents, or of a clear agreement either about the basis on which the payment was being made or about the right to possession of the bill of lading, it is necessary to ascertain the parties' rights by applying general principles of law. In order to do so, it is necessary to have regard to their rights and obligations immediately before the payment was made. Perhaps the first question to consider is whether Gunvor's demand for payment against the backdrop of the particulars of claim [in the litigation between the Gunvor and SCB] amounted to an implied request to SCB to perform the contract contained in the letter of credit by remitting its face value (together with interest representing damages for delay in payment) or whether it amounted to no more than a claim for damages for breach of the obligation contained in the letter of credit.⁷

12.4.3 *Whether to claim in debt or not, that is the question*

As can be seen from the above statement of Moore-Bick LJ, the Court of Appeal decided it was necessary to look at general principles to determine the answer to the question of whether, on payment, SCB became the holder of the bills of lading or not. In doing so, it had to analyse and, indeed, determine the general principles of law that governed a beneficiary's claim against a bank which dishonoured a LC. It is this analysis by the Court of Appeal that will be of most interest to traders faced with a bank dishonouring a credit.

The Court of Appeal had first to grapple with the question of the nature of a claim against a bank which dishonours a LC. Was it, *prima facie*, a claim in debt or a claim in damages? At a late stage after the appeal hearing, the Court of Appeal invited and received from the parties further detailed written submissions on this issue, which ultimately became the central issue in determining the appeal. The reason why it was important was because SCB argued that, on a true analysis, the claim being made by Gunvor was one in debt and that, if Gunvor was to recover on a debt, there must be a corresponding obligation on them to transfer the documents, including the bills of lading, to SCB. This was because presentation and transfer of the documents required under the LC was a condition of the existence of the debt itself. In contrast, the owners and Gunvor said that, applying general principles of law, Gunvor's claim against SCB was only for damages for breach of contract. They said that, whilst presentation of the documents was necessary before the obligation to pay arose, payment having been refused, transfer of the documents was not necessary to give rise to a claim for damages equivalent to the sum due under the credit. They also argued that, since there was no agreement to the transfer of the bills of lading upon payment, they had not been transferred to SCB.

⁷ [2014] EWCA Civ 1382; [2015] 1 Lloyd's Rep 97 at [36].

The owners and Gunvor argued that the position in respect of a claim arising out of a dishonour of a LC was the same as in relation to the dishonour of a bill of exchange where, by virtue of s. 57 of the Bills of Exchange Act 1882, the measure of damages for dishonour included the amount of the bill, interest and the expenses of noting. Whilst accepting this was indeed the position in respect of a bill of exchange, Moore-Bick LJ in the Court of Appeal observed that ‘There is surprisingly little authority, however, on the nature of a claim for dishonour of a letter of credit.’⁸

Moore-Bick LJ reviewed the authorities and concluded as follows:

Whatever view may have been taken at the time when letters of credit were in their infancy, in my view, the modern cases support the proposition that if the opening or confirming bank fails to pay against presentation of conforming documents under a letter of credit payable at sight, the beneficiary may sue in debt to recover the value of the credit, provided he is willing and able to transfer the documents to the bank against payment. . . . If the beneficiary is willing and able to transfer the documents to the bank, therefore, he is entitled to recover the face value of the credit as a debt. If he is not willing or able to hand over the documents, the position is different, as Sir Christopher Staughton pointed out in *Seaconsar Far East v. Bank Markazi*. Since the contract provides for payment against documents, the beneficiary is not entitled to recover the full value of the credit otherwise than on surrender of the documents.⁹

On the basis of that conclusion, he continued:

It follows that in my view the judge was right to proceed on the footing that Gunvor’s claim to recover the face value of the credit properly sounded in debt rather than damages (subject to the right to recover any consequential losses as damages). Gunvor had no right to recover the full value of the credit otherwise than against transfer of the documents. It did not ask for the documents to be returned and by accepting payment of the face value of the credit necessarily accepted that SCB was entitled to take them up. . . . If Gunvor had retained the documents and had sued SCB to recover damages for breach of contract in wrongfully rejecting the documents, it would have been obliged to give credit for their value, but that did not happen.¹⁰

Against that background, the Court of Appeal concluded that the payment made by SCB to Gunvor following the commencement of proceedings was in fact a payment made pursuant to the original LC and thus, notwithstanding SCB’s arguably unnecessary concession with regard to the bills being spent at the time of payment, SCB had become lawful holders of the bill of lading upon payment.

It would be invidious in the circumstances to criticise the Court of Appeal’s approach; and certainly, given the authorities, one could not say that the court’s conclusions with regard to the general principles of law applying to a claim against a dishonouring LC bank were misguided. However, one of the complaints made in relation to the Court of Appeal’s judgment in the owners’ unsuccessful application to the Supreme Court for permission to appeal was that the Court of Appeal assumed that the parties, in particular Gunvor, must have been proceeding in

8 [2014] EWCA Civ 1382; [2015] 1 Lloyd’s Rep 97 at [41].

9 [2014] EWCA Civ 1382; [2015] 1 Lloyd’s Rep 97 at [51].

10 [2014] EWCA Civ 1382; [2015] 1 Lloyd’s Rep 97 at [52].

accordance with what, after very detailed and technical argument, the Court of Appeal themselves concluded were the general principles of law applying to such claims. It was wrong, the owners and Gunvor submitted, for the Court of Appeal to conclude that because that court concluded that, as a matter of law, an unequivocal demand on a dishonouring LC bank for payment must be a claim in debt rather than in damages it must be assumed that, in this case, Gunvor must have intended, by seeking to enforce their rights under the LC, to re-tender the bills of lading to SCB; still less that, on payment, it was to be inferred that SCB had accepted that silent re-tender so as to complete the indorsement of the bills by delivery as required by s. 5(2)(b) of the Act.

12.4.4 Do I want my documents back? – a documentary credit dilemma

This brings us to the title of this paper and to a discussion of where the decision in the *Erin Schulte* case leaves a LC beneficiary facing a dishonour of a LC by an issuing or confirming bank. In the light of the Court of Appeal's judgment, the beneficiary has a decision to make. Do they claim in debt and leave the bill of lading available to the bank to take up whenever it likes upon payment? Or do they take the bill of lading back (or at least make it clear that having been rejected, the bills of lading do not remain open to be taken up by the bank) and claim in damages? The decision to be made puts the beneficiary on the horns of a dilemma on which, arguably, they should not be impaled. This is particularly so having regard to the fact that, as the Court of Appeal in *The Erin Schulte* observed, LCs were intended to be the lifeblood of international commerce and were intended by those who use them to be 'as good as cash'.

If a beneficiary resolves to maintain its claim in debt and if it is the charterer of the carrying vessel or exposed to demurrage liabilities under its own purchase contract, the beneficiary may incur significant liability for demurrage pending the resolution of the claim in debt. This is so because there is nothing it can safely do to facilitate delivery of the cargo as, having decided to claim in debt, the bills of lading have to be left available for the bank to take up as and when they decide to pay, or are required to pay pursuant to a judgment. The beneficiary is therefore unable to surrender the bills to the carrier to facilitate discharge of the cargo. The vessel will just have to sit and await the resolution of the claim under the LC. In a long contested case, it is not difficult to anticipate delays of two or three years before liability under the LC is finally determined and the recalcitrant bank pays.

In addition to the beneficiary's exposure to demurrage as the vessel sits at the discharge port awaiting the outcome of the litigation under the LC, there is potential for deterioration of the cargo. Of course, what the beneficiary could do, as it did in the *Erin Schulte* case, is to seek to facilitate delivery of the cargo by issuing a letter of indemnity to the carrier for delivery without production of the bills. However, as the same case illustrates, that is a potential recipe for disaster so far as the beneficiary is concerned. The Court of Appeal in the *Erin Schulte* case acknowledged that a beneficiary who claims in debt is also entitled to claim any consequential losses as damages. However, it would be open to the bank to argue that, for one reason or another, the beneficiary has failed to mitigate its loss.

Conceivably, it might successfully argue that despite the risks involved, the reasonable course in such circumstances is indeed for the beneficiary to issue a letter of indemnity to get the cargo off the ship to prevent demurrage running, as well as deterioration of the cargo.

Other than the uncertainty as to the recovery of consequential losses that continue to accrue whilst the bills of lading remain in a constant state of presentation to the LC bank, there is the risk of allowing huge costs and losses to accumulate which are ultimately irrecoverable because the claim in debt under the LC fails. One might say that if the claim under the LC is a bad one, the beneficiary deserves what it gets. However, as we know, issues such as whether a document is compliant with the requirements of the LC or whether there is an inconsistency between documents presented under a LC can be finely balanced, and there will be many cases where the beneficiary's claim under the LC in debt, whilst ultimately unsuccessful, may be quite a reasonable claim to have made. There is therefore a potentially high cost to the beneficiary in maintaining their claim in debt against the LC bank, and certainly such costs are likely to act as a considerable disincentive to maintaining a claim in debt against the bank.

As articulated above, the alternative to maintaining a claim in debt is, in essence, to take back the documents, including the bills of lading, and claim the sum due under the LC subject, as the Court of Appeal in *The Erin Schulte* observed,¹¹ to giving credit for the value of the bills of lading. Since one is then again in the territory of a claim for damages, there is an obligation on the beneficiary to mitigate its losses. In the usual scenario, where the goods concerned are on the water on their way to, or have already arrived at, the delivery destination identified in the bills of lading, the options open to the beneficiary with regard to the disposal of the cargo are bound to be limited; indeed, the cargo might be regarded in the market as 'distressed'. Naturally, if a beneficiary in those circumstances does its best and disposes of the bills of lading, and the goods represented by them, on the best terms reasonably available, then it should have no worries. However, one needs little experience of litigation to anticipate the sort of arguments that might be run by the bank about the reasonableness of the conduct of a beneficiary in disposing of the bills of lading or goods in such circumstances. In addition to potential criticism in relation to the price achieved under such a substitute sale, the beneficiary might find themselves in a position where they are required to sell to a party, including possibly the original buyer, without the provision of payment security. What might be the position in those circumstances if the bills having been presented to the buyer, the buyer fails to pay for the goods. Would this be a *novus actus*, meaning that the beneficiary is limited to claiming the sum that would have been due under the letter of credit less the notional substitute sale price, despite the default in payment by the buyer? Once again, the beneficiary would be faced with the vagaries of the law of damages with no certainty that, having taken back the bills of lading, they will be in the same position as if the bank had honoured

11 [2014] EWCA Civ 1382; [2015] 1 Lloyd's Rep 97 at [52].

the LC as they should have done on first presentation. So, once again, the concept of the LC being ‘as good as cash’ takes something of a battering.

Despite the impression that may be given by the above analysis, the merit points are not all one-way in terms of the effect of the judgment in the *Erin Schulte* case. If a beneficiary is entitled to maintain a claim in debt or, indeed, in damages for the full amount of the sum due under the letter of credit as liquidated damages, and do so without having to surrender the bills of lading, this would entitle a beneficiary to obtain both payment of the full sum due under the LC and retain the bills of lading. So, applying that position to the facts of the *The Erin Schulte*, if the owners and Gunvor were right in their argument, they would, in theory, be entitled to be paid the full sum due under the LC upon the wrongful rejection of the presentation, take back the bills of lading and then dispose of the cargo elsewhere – in essence get paid twice for the same cargo. Theoretically that must be so, but in circumstances in which the beneficiary will have been paid for the cargo, it is bound to face liability to the buyer for non-delivery of the goods if it engineers delivery of them elsewhere. In any event, from a public policy perspective, one might argue that there should be little sympathy for a bank that dishonours a LC if, once they eventually voluntarily pay, or are required to pay the sums due under the LC, they are not entitled to the documents they wrongfully rejected, having regard to the invidious position in which a continuing right to the documents places the innocent beneficiary.

One is therefore led to a philosophical debate as to where the balance of justice lies in the circumstances of a wrongful rejection of a presentation under a LC. Is it more just for the law to allow a LC bank, by wrongfully rejecting a presentation, to place the beneficiary in the invidious position of having to choose between a claim in debt or a claim in damages – at the risk only of having to compensate the beneficiary for any recoverable damages incurred whilst maintaining their claim in debt? Would it not be fair in such circumstances for a dishonouring bank to be required to pay the full amount due under the LC without the right to the documents as a result of its initial wrongful rejection of them? In the light of the decision in the *Erin Schulte* case, it is suggested that the security of payment provided by a LC has, to an extent, been undermined; and since permission to appeal to the Supreme Court was refused, English law in this respect is unlikely to change in the foreseeable future. Whether those responsible for the next addition of the UCP might want to have a look at the issue and provide for a more beneficiary-friendly regime to govern LC bank default is of course another matter.

Lending on waybills and other documents – banker's dream or financier's nightmare?

*Professor A. Tettenborn**

What should be the reaction of a bank if asked to lend against a sea waybill covering a cargo in transit? This question is the subject of this paper. It matters, for three reasons.

First, there is a point of numbers. Despite the disproportionate time devoted by professors of international trade law to expounding the logical niceties of bills of lading, for some time now the majority of all cargoes transported by sea have actually been carried on the basis of sea waybills¹ or other, even more informal, documents.² Old-fashioned negotiable bills of lading, even if one counts among them negotiable multimodal transport documents³ and curiosities such as European waterway CMNI documents,⁴ are becoming more and more of a specialist document for the bulk commodity trade and a few other niche businesses.

Second, there is commercial practice. The disinclination to use bills of lading has good reasons of cost and practicality behind it;⁵ as a trend, it is not only approved by the CMI⁶ but reflected in other international trade instruments. The UCP since 1993 have happily contemplated presentation of sea waybills to operate letters of credit where so provided (as it increasingly is), adding detailed provisions about what is presumptively acceptable here.⁷ Incoterms 2010 now refer even-handedly to bills of lading and sea waybills in connection with CIF contracts, even though these were once thought of as the class of transaction where the bill of lading reigned supreme.⁸

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1 First issued, it seems, by the Atlantic Container Line in 1970: see R. Vocos, 'The Sea Waybill: A New Innovation in the Carriage of Goods by Sea' (1988) 5 *Cargo Claims Analysis* 132, at p. 133.

2 Such as ferry receipts, commonplace on short sea crossings.

3 Which may or may not have the characteristics of the old-fashioned ocean bill of lading.

4 Which is explicitly given the effects of a maritime bill of lading if so intended: CMNI Convention 2001, Arts.11 and 13.

5 A. Lloyd, 'The Bill of Lading: Do we really need it?' [1989] *LMCLQ* 49; also S. Girvin, *Carriage of Goods by Sea* (2nd edn, OUP, 2011), Ch 4.

6 Since its 1983 Colloquium in Venice, where a resolution was passed that the practice of issuing a bill of lading when a negotiable instrument was not required should be discouraged. See too a 2001 resolution of the UN Economic Commission for Europe, available at UN Econ Comm'n for Eur [UNECE], UN Centre for Trade Facilitation and Electronic Business [UN/CEFACT], Recommendation No 12, Second Edition, UN Doc ECE/TRADE/240 (2001).

7 See UCP 500 (1993), Art. 24 (now UCP 600, Art. 21).

8 Incoterms 2010, CIF, A8.

Third, whatever the intellectual attractions of the complex web of duties arising from carriage by sea, it has to be remembered that goods sold in international trade not infrequently travel more prosaically by air, rail or road. Such goods equally need financing; and in each of these cases the regimes under which goods are carried are closer to that of the sea waybill than the old-fashioned bill of lading. From this it follows that the answer to whether a sea waybill is a safe security may well carry implications for those asked to lend on the basis of CMR or air consignment notes, since the issues may well be much the same.

13.1 The traditional position

The traditional learning on the subject of transport documents can be summed up along the following lines. While the bill of lading may be fading in popularity, this is not an argument for abolishing it, but rather for limiting its use to where it is truly indispensable (for instance – to take the best-known example – where we envisage repeated CIF sales of a commodity cargo at sea). Now, one such case is said to arise precisely where it is envisaged that the goods are to be used as security while in transit, by way of the buyer executing a pledge in favour of the bank financing the purchase. Only with a bill of lading, it is assumed,⁹ is this possible: because of the unique features of this venerable document, no other piece of paper will do. True, sea waybills, or for that matter other documents like cargo receipts or delivery orders, might give a lender a degree of practical comfort and protection. With them the lender can readily get delivery of the goods from third parties if it wishes, and, conversely, keep them out of the hands of its borrower unless it agrees; and, as we all know (at least outside the academic enclave), possession is nine-tenths of the law. But even if this is true, the other tenth can still matter a lot, especially to a cautious lender. And that lender may well be concerned. Specifically, it may be worried about the possibility of suits by the creditors of its borrower alleging that its security was invalid and seeking to claw back any value realised: particularly so in these days where, whatever the situation in the comfort zones of London, New York or Frankfurt, the writ of the courts

9 For examples of this assumption see P. Bugden, *Goods in Transit* (3rd edn, Sweet & Maxwell, 2013), at 4–30; R. Williams, 'Waybills and Short Form Documents: A Lawyer's View' [1979] LMCLQ 297; G. Humphreys & A. Higgs, 'Waybills: a case of common law laissez faire in European commerce' [1992] JBL 453, at p. 468; S. Cook & G. Wynne, 'Warehouse receipts past, present and future: Part 1' (1998) 17 IBFL 8; C. Pesovic, 'Documents of title in carriage of goods by sea: present status and possible future directions' (2001) JBL 461, at pp. 479–480. As Judith Prakash J has put it in Singapore: 'A sea waybill is the maritime version of a document that has long been in use in the context of land and air carriage. It operates as a receipt for goods received for shipment and evidences the contract of carriage. One significant difference between it and a bill of lading is that it is never ever a negotiable instrument and is therefore usually used on short sea routes and *where neither the shipper nor the cargo receiver needs to pledge shipping documents in order to raise finance.*' – *Voss Peer v APL Co Pte Ltd* [2002] 3 SLR 176, 186 (emphasis added). But this assumption, it is fair to add, is not universal. For a perceptive sceptical paragraph on the subject see E.P. Ellinger, 'Trust Receipt Financing' (2003) 18 JIBLR 305, at p. 309.

of the jurisdiction containing a bankrupt corporation's head office can run surprisingly wide.¹⁰

13.2 The traditional view: a closer look

There is certainly a grain of truth in the traditional view just described, with its clear differentiation between bills of lading and everything else, including sea waybills. Nobody says that a sea waybill can be used in the same way as a bill of lading when it comes to creating a pledge over goods. The reason is simple: as a sea waybill is by definition not transferable at all, the traditional technique of endorsing it in favour of a lender and then handing it over will obviously not work. But the significance of this fact is limited. There is a straightforward and obvious workaround to get over the non-transferability issue. Suppose a bank acting for a purchaser wants to finance the purchase of a shipment of goods to be carried under a sea waybill. There is nothing to stop it demanding that the waybill name itself as consignee; that way it will be entitled to delivery of the cargo, with the buyer if necessary taking physical delivery with its permission under some kind of trust receipt agreement.¹¹ True, until 1992 this arrangement was open to the objection that the bank's right to claim delivery from the carrier was, to say the least, doubtful. Even if the waybill obliged the carrier to deliver to the bank, the bank was not a party to that contract so as to have *locus standi* to enforce it; nor did s. 1 of the Bills of Lading Act 1855 help, since it did not apply to sea waybills. But the Carriage of Goods by Sea Act 1992 has swept away all this nineteenth-century nonsense. Under s. 2(1) of that Act, the consignee under a sea waybill now has the right to enforce its terms against the carrier, including the duty to deliver.

If sea waybills are really unfit as security, therefore, the reason must lie elsewhere, namely in one or more of the other legal differences between them and bills of lading. Essentially these come down to three.

First, because of a combination of s. 2 of the Carriage of Goods by Sea Act 1992 and Art. III r. 4 of the Hague-Visby Rules, the bill of lading holder gets the benefit not only of any contractual cargo claims, but also of any estoppel arising out of statements by the carrier in the transport document as to the quantity, amount or condition of the goods on loading. Unlike the 1992 Act, however, the provisions of the Hague-Visby Rules do not apply to a sea waybill unless expressly incorporated in its wording.

10 This is particularly true within the EU, as a result of the 2000 EU Insolvency Regulation (Council regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings), under Art. 4 of which the courts of a corporation's centre of main interests have almost complete control of the administration of the insolvency and other EU courts must cooperate with them and apply their law. But the same is true to a lesser extent in other cases, where, under the Cross-Border Insolvency Regulations 2006, SI 2006 No 1030 (embodying the UNCITRAL Model Law on Cross-Border Insolvency of 1997) courts may still have to stay actions against a corporation or its property according to principles applicable in its home jurisdiction.

11 An arrangement which will preserve any pledge in favour of the bank, in so far as any has been created: *North Western Bank Ltd v Poynter Son & MacDonalds* [1895] AC 56. For a recent example of this in operation with a non-bill of lading, see the Hong Kong decision in *Re Hang Fung Jewellery Co Ltd* [2010] 2 HKLRD 1.

Second, where a bill of lading is issued, the goods must be, and may only be, delivered against surrender of it.¹² Put another way, the lender as holder gets cast-iron rights, against not only its customer, but also any third parties who obtain the goods, not to mention the carrier itself who lets them have them; furthermore, by parity of reasoning, the *prima facie* right of the shipper to change the destination of the goods by notice to the carrier, which applies as much to a bill of lading as to any other contract of carriage,¹³ is defeated as soon as the bill is transferred to a subsequent holder. Neither rule applies to a sea waybill, which is regarded as simply a contract by the carrier with the shipper to deliver the goods to the consignee named in it, and presumptively always remains subject to the shipper's right to change their mind.¹⁴

Third, a bill of lading is a true document of title,¹⁵ such that its transfer is equiparated to that of the goods themselves: from which it follows that no issues can arise as to whether the lender has the necessary degree of control or possession to amount in law to a valid pledge. This is not true of other documents. Lord Wright made the point clearly some eighty years ago. '[A] pledge of documents,' he said, 'is not in general to be deemed a pledge of the goods; a pledge of the documents (always excepting a bill of lading) is merely a pledge of the ipsa corpora of them; the common law continued to regard them as merely tokens of an authority to receive possession . . .'.¹⁶

Let us take each in turn.

13.2.1 *Claims against the carrier*

Although the holder of a sea waybill has since 1992 had the same contractual claims against the carrier as a bill of lading holder, it is true that there is one statutory protection which they miss out on. This is because the bill of lading holder not only has the right to sue the carrier in contract, but in addition is also protected by Art. III r. 4 of the Hague-Visby Rules on carriers' statements about the quantity or apparent condition of goods loaded. This provision, which applies only to bills of lading, makes such statements presumptive evidence in respect of shippers, and conclusive evidence *vis-à-vis* subsequent transferees of the goods. The result is that in the case of short or damaged delivery, the carrier is in effect strictly liable to the transferee;¹⁷ this is a point of some importance, for obvious

12 S. Girvin, *Carriage of Goods by Sea* (2nd edn, OUP, 2011), at 10.02–10.03. The classic authorities are *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, esp. at 586, and *Motis Exports Ltd v Dampskibsselskabet AF 1912 A/S* [2000] 1 Lloyd's Rep 211.

13 See e.g. *Mitchel v Ede* (1840) 11 A & E 888, at 903, per Denman CJ; also *The Lycaon* [1983] 2 Lloyd's Rep 548, at 554–555, per Lloyd J.

14 See e.g. *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm); [2012] 1 CLC 798.

15 S. Girvin, *Carriage of Goods by Sea* (2nd edn, OUP, 2011), at 8.01–8.09; T. Schmitz, 'The bill of lading as a document of title' (2011) 10 JITL & P 255.

16 *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, at 59.

17 Because the carrier is liable unless they can prove that the loss was due to an excepted peril while the goods were in their charge, which *ex hypothesi* they cannot do if the damage or deficiency existed at the time of loading: see *Gosse Millerd v Canadian Government Merchant Marine Ltd* [1929] AC 223, at 234, per Lord Sumner.

reasons, to a lender, which will always have to contemplate what happens if the worst happens and it needs to realise its security.

In fact, however, this difference between bills of lading and other documents is more apparent than real. This is because in this respect the Hague-Visby Rules simply reproduced the position that had been held to obtain in any case at common law as a result of applying the ordinary principles of evidence and estoppel, under which any receipt is *prima facie* evidence of what it states, and in so far as a statement in it is relied on by a third party cannot then be contradicted.¹⁸ Although all the cases concern bills of lading, there is no reason to think that those rules cannot apply to transport documents in general, whatever their nature. Thus if a financing bank is the consignee under a waybill in respect of goods that were (for example) wrongly stated to have been shipped in apparent good order and condition,¹⁹ the bank will nevertheless have a claim against the carrier of almost exactly the same nature as one under Art. III r. 4. It follows that even if there is a technical difference between the position of the holder of a bill of lading and a sea waybill in this respect, it cannot affect the use of the latter document as a form of security.

13.2.2 *The consignor's right to divert*

At common law, the shipper under a bill of lading retained the right presumptively accorded to any shipper of goods to change the stated destination.²⁰ But they did so only so long as they were in possession of the bill of lading:²¹ once the bill of lading had been transferred, they lost their right to control the goods, and the transferee gained it.²² The latter qualification is, indeed, the other side of the coin

18 See *The Peter der Grosse* (1875) 1 PD 414 and *Crawford & Law v Allan Line SS Co Ltd* [1912] AC 130 (presumption); *Compania Naviera Vasconzada v Churchill & Sim* [1906] 1 KB 237; *Silver v Ocean SS Co Ltd* [1930] 1 KB 416 (estoppel). Generally, P. Bugden, *Goods in Transit* (3rd edn, Sweet & Maxwell, 2013), at 6–007–6–008.

19 There is one qualification. If goods were never shipped at all, there is antique authority at common law that a master has neither actual nor ostensible authority to acknowledge loading of goods never shipped: see *Grant v Norway* (1851) 10 CB 665. This is reversed by s. 4 of the Carriage of Goods by Sea Act 1924, but only in the case of bills of lading, thus potentially leaving the holder of a waybill unprotected (see G. H. Treitel & F. M. D. Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, 2012), 2–029). On the other hand, *Grant v Norway* itself has been castigated as ‘conceptually aberrant’ (Colman J in *The Starsin* [1999] CLC 1769, at 1783) and has been ‘consistently criticized and distinguished’ (Timothy Walker J in *Alimport v Soubert Shipping Ltd* [2000] 2 Lloyd’s Rep 448). Today there might well be an inclination either to disapply it or to distinguish it out of existence, possibly by limiting it to the master personally, and not applying it to the case of carriers’ agents who today in practice sign all bills of lading on the carrier’s behalf.

20 E.g. *Brandt v Bowlby* (1831) 2 B & Ad 932.

21 See *Mitchel v Ede* (1840) 11 A & E 888, at 903, per Denman CJ; also *The Lycaon* [1983] 2 Lloyd’s Rep 548, at 554–555, per Lloyd J.

22 ‘The owner of the goods may change his purpose, at any rate before the delivery of the goods themselves or of the bill of lading to the party named in it, and may order the delivery to be to some other person’ – *Mitchel v Ede* (1840) 11 A & E 888, at 903, per Denman CJ (emphasis added); see too *Schotsmans v Lancashire & Yorkshire Ry Co* (1866–67) LR 2 Ch App 332, at 336, per Lord Chelmsford. Essentially this was the point at issue in the classic case of *Lickbarrow v Mason* (1788) 2 TR 63.

to the rule that goods must be delivered against,²³ and only against,²⁴ actual surrender of the bill of lading, on the straightforward ground that once someone other than the shipper is in a position to surrender the bill of lading and demand immediate delivery, any right in the shipper to interfere must clearly give way.

With a sea waybill, as with land-based analogues such as the CMR consignment note, things are different. The shipper, as contracting party, is master of the goods during the whole time they are in transit, until actual delivery to the consignee.²⁵ The fact that the latter is in possession of a document such as a sea waybill is beside the point: such a document is merely a statement of the terms of the contract of carriage, which neither needs to be presented to get delivery nor as such gives a right to delivery. This is the position at common law:²⁶ but it is often made express. A typical provision (taken from the CMI Rules on Sea Waybills, incorporated by reference in very many such documents) provides that the shipper

shall be the only party entitled to give the Carrier instructions in relation to the contract of Carriage. He shall be entitled to change the name of the consignee at any time up to the consignee claiming delivery of the Goods after their arrival at destination, provided he gives the Carrier unambiguous notice in writing, or by some other means acceptable to the Carrier, and thereby undertaking to indemnify the Carrier against any additional expense caused thereby.²⁷

It is obvious that, taken at face value, this is a severe problem for a lender financing a buyer. Even if named as consignee, their security is technically dependent on the whim of the consignor. It may be nullified if the consignor instructs the carrier to deliver elsewhere, having (for example) been persuaded by a less than honest buyer to authorise the release of the goods to the latter direct.

Can this objection be got over? One's first instinct is that there is an easy work-around. The provision of the CMI Rules just mentioned, having given the shipper the right to divert the goods, immediately qualifies it. The shipper, it says,

shall have the option, to be exercised not later than the receipt of the goods by the carrier, to transfer the right of control to the consignee. The exercise of this option must be noted on the sea waybill or similar document, if any. Where the option has been exercised the consignee shall have such rights as are referred to in subrule (i) above and the shipper shall cease to have such rights.²⁸

23 *Glyn Mills v East & West India Dock Co* (1881–82) LR 7 App Cas 591; and e.g. *The Rio Sun* [1985] 1 Lloyd's Rep 350, at 366, per Bingham J.

24 *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, esp. at 586.

25 G. H. Treitel & F. M. D. Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, 2012), at 8–014; *AP Moller-Maersk A/S v Sonae Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm); [2012] 1 CLC 798 at [37]–[38], Christopher Clarke J. Note, however, that it may be possible to infer that the consignor contracts as agent on behalf of the consignee, especially where ownership passes to the latter on shipment. If so, control would seem to be in the consignee during transit: *Cork Distilleries Co v Great Southern & Western Ry Co (Ireland)* (1874–75) LR 7 HL 269.

26 *Brandt v Bowlby* (1831) 2 B & Ad 932. See too *Scothorn v S. Staffs Ry Co* (1853) 8 Ex 341 and O. Kahn-Freund, *The Law of Carriage by Inland Transport* (4th edn, Stevens, 1965), 303–306.

27 CMI Rules, 6(i).

28 CMI Rules, 6(ii).

Unfortunately, if taken *au pied de la lettre* this qualification does not give the lender what it needs, and indeed on one reading is almost entirely nugatory. The shipper's right of abandonment by notation on the sea waybill can, it says, be exercised only before the carrier has taken over the goods; but waybills are frequently issued later than that (for the very good reason that, among other things, they usually acknowledge receipt of the goods, and one cannot in good conscience admit receipt of something one has not yet got). If this is right, a declaration of abandonment present on the waybill when signed would be automatically ineffective: like Cinderella, all dressed up but with nowhere to go. It is to be hoped that such a nonsensical interpretation would be rejected, particularly since clauses of this kind are not uncommon, but banks have every right to be cautious. In any case, however, this awkwardness can be dealt with. The bank can either demand a waybill that removes any requirement that renunciation take place before the taking over of the goods, or alternatively insist on a specific provision for automatic abandonment in certain circumstances. Indeed, no doubt as a result of pressure from the banking industry, a number of forms now contain a term doing exactly this in the lending context. A typical clause of this type reads as follows: 'Upon acceptance of this Waybill by a Bank against a Letter of Credit transaction (which acceptance the Bank confirms to the Carrier) the Shipper irrevocably renounces any right to vary the identity of the consignee of these goods during transit.'²⁹ There is no reason to doubt that such a clause would be enforceable against the carrier by the bank under the provisions of the Carriage of Goods by Sea Act 1992, thus providing it with the protection that it needs.

13.2.3 *The lack of any requirement for surrender*

So much for the awkwardness of the consignor's right to divert the goods. What of the corollary attached to that point, the rule that sea waybills by their nature do not need to be presented in order to obtain delivery of the goods from the carrier? It is certainly true that the opposite principle applicable to bills of lading, requiring actual documentary presentation in order to obtain goods and forbidding their delivery in any other circumstances, is a powerful argument in favour of insisting on using them where any issue of security is in issue. Banks love the feeling of security this provides; once in possession of a bill of lading, at least in England, they have the benefit of an automatic right to sue the carrier in conversion with no questions asked if the goods are not forthcoming against their demand.

On the other hand, this feature of bills of lading is notoriously awkward for other reasons – notably the prospect that the vessel may arrive while the bill of lading is physically elsewhere, as often as not in the hands of some bank's back office possibly thousands of miles away. Furthermore, it is suggested that it is doubtful whether – peace of mind aside – banks actually need the protection provided by the formal requirement applying to bills of lading in order to safeguard

²⁹ See e.g. BIMCO's MULTIWAYBILL 95, Art. 8. The clause is widespread: it also appears, for example, in the standard non-negotiable waybill issued by Seatrade NV.

their interests. As pointed out in the previous paragraph, in the case of a properly drafted sea waybill naming the bank as consignee, the bank can, it seems, get virtually the same right against the third party carrier, save in contractual rather than proprietary form. Put briefly, it gets not only all the rights under the contract of carriage, but also the benefit of a cast-iron and indefeasible contractual right as against the carrier not to have the goods delivered save to it or to its order, backed up by an assurance of a right to damages in the event of breach. There seems little to choose between this and a right to sue in tort for conversion to protect the bank in the case where – as is normally the fact in disputes of this sort – the goods end up in the hands not of the bank but of the party it was financing, and the bank as a result loses its money.

13.2.4 The fact that sea waybills do not represent the goods and are not documents of title

If the above arguments are correct, it follows that any argument about the unsatisfactoriness of a sea waybill as security must stand or fall by reference to the third distinguishing feature of a bill of lading: the latter's function as a representative document, or document of title.³⁰ Descending to specifics, what we are dealing with here is the vital characteristic of a bill of lading that not only can its transfer amount to a transfer of ownership of the goods it represents,³¹ but, in addition, its physical delivery is (if so intended) treated as giving rise to a deemed delivery of the goods themselves.³² This feature means that the delivery of a bill of lading to a lender has the convenient effect of killing three birds with one stone. It gives the lender *de facto* control over the goods which the borrower cannot disturb (since without the bill of lading they cannot get them). It provides for remedies against third parties such as the carrier (because of the Carriage of Goods by Sea Act 1924). And it confirms beyond a doubt that the lender has possession in the eyes of the law. Other documents, including waybills, may have the first two effects: but they do not have the third.

30 See generally P. Todd, 'Bills of lading as documents of title' [2005] JBL 762; T. Schmitz, 'The bill of lading as a document of title' (2011) 10 JTTL & P 255.

31 Which is true, but as a matter of English law not enormously important. Although in international sales it is normally the case that ownership is transferred with the bill of lading, the actual rule of law is that ownership passes whenever the parties intend it to pass, because of s. 17 of the Sale of Goods Act 1979. The rule tying transfer to the delivery of a bill of lading is thus merely a presumption as to that intention. See generally C. Pejovic, 'Documents of title in carriage of goods by sea: present status and possible future directions' [2001] JBL 461, at p. 470. In other systems of law the point may matter more: particularly in German law and those systems based on it, where a mere contract to sell cannot itself transfer ownership.

32 See *Lickbarrow v Mason* (1794) 5 TR 683, at 685–686; also C. Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel, 2009), para. 2.3; C. Pejovic, 'Documents of title in carriage of goods by sea: present status and possible future directions' [2001] JBL 461, at 467. German lawmakers make the point graphically clear: referring to a bill of lading as a *Traditionspapier*, it goes on to say that 'As long as the carrier is in possession of the goods, the delivery of the bill of lading to the consignee named in it has the same effect as regards transfer of the rights in the goods as the delivery of the goods themselves' (HGB, § 526). The same is then stated to apply to further deliveries to third parties: *ibid*.

This matters. Banks lending against documents rely on having the benefit of a valid pledge: and for this a transfer of possession is a fundamental requirement.³³ If it is not present, then whatever the intention of the parties, there can be no valid possessory security.³⁴ However much control the lender has de facto, and whatever their contractual rights, there is always the prospect of a successful challenge by the borrower's liquidator or other creditors to the lender's right to realise the goods in satisfaction of their debt. Nor is this an empty threat, as witness the result in the leading case on documentary pledges, *Inglis v Robertson*.³⁵ Lenders lent against warehoused whisky, taking possession of a warehouseman's warrant without which it could not be physically accessed. Later the borrower's creditors seized the whisky itself by way of diligence.³⁶ In the ensuing contest between lenders and creditors, the House of Lords supported the latter, on the basis that the delivery of a mere warrant had not transferred possession to the lenders; from this it followed that the lenders, without possession, had had no valid security interest opposable to the seizure.

At first sight this looks like a death blow for the use of sea waybills as security. If the lenders in *Inglis* lost out despite their possession of delivery warrants, surely it must follow that anyone lending against a sea waybill must be in danger of suffering exactly the same fate: absent any transfer of a bill of lading with its magical effects on possession, their merely documentary security fails outright.

Such a conclusion, however, may be too hasty. Accept for the time being that, on facts similar to *Inglis v Robertson*, it cannot make any difference whether the document hypothecated is a carrier's waybill or a warehouseman's warrant: in either case, the lender's claim to a possessory security must fail as a matter of law. But in a typical financing of goods by a buyer's bank against sea waybills, this is not what happens. The procedure outlined above is not a simple handing over of a piece of paper, but a more complex process. Typically the seller (shipper) hands over goods to a carrier; the carrier issues and signs a waybill naming the lender as consignee; the waybill is then, as intended, delivered to the consignee (the lender). Under the terms of the waybill, moreover, the carrier undertakes binding legal obligations to the lender, including an obligation to account for the goods to them and no one else. In such a case, it is suggested that there are a number of reasons for arguing that the lender does have possession in law, sufficient to overcome the objections raised in *Inglis v Robertson* and constitute them a pledgee.

The first of these reasons is party intent. All the relevant participants intend that the lender, to the exclusion of anyone else, should have control, both factual and legal, over the goods. To them alone are owed the carrier's duties under the waybill; they alone have the exclusive right in law to dictate what happens to the goods; and they alone have the power to dictate whom they should be delivered to. In so far as possession is regarded as a matter of a combination of factual

³³ See e.g. M. Bridge, *Personal Property Law* (3rd edn, OUP, 2013), pp. 146–147.

³⁴ *Inglis v Robertson* [1898] AC 616, below.

³⁵ [1898] AC 616. Although this was a Scottish case, the law on pledge is the same on both sides of the border, and hence the treatment of the issues is equally valid for England.

³⁶ The Scottish form of execution.

hegemony and legal control,³⁷ the lender is the best candidate by far to be regarded as vested with it. Moreover, this is not simply abstract argument: there is also at least some hard authority in favour of such a position. In *Kum v Wah Tat Bank Ltd*³⁸ sellers shipped rubber against mate's receipts which were, at the insistence of the buyer's bank (which was financing the transaction), deliberately made out in favour of it as consignee; the receipts were duly delivered to the bank.³⁹ The carrier delivered the rubber to the buyer itself notwithstanding this arrangement; since the buyer was not worth powder and shot, the bank sued the carrier. The carrier argued that the bank had no title to sue since it had not had legal possession of the rubber, but the Privy Council disagreed. Even though the mate's receipts did not have the characteristics of bills of lading (and indeed were expressly claused 'not negotiable'), the circumstances of their issue provided, it was said, ample evidence of an intent that delivery of the goods to the ship should be treated as delivery to the bank.

Second, we may also be able to reach the same result on the basis of attornment. Although a good deal is written about the complexities of attornment,⁴⁰ essentially it consists in a bailee's 'acknowledgment that someone other than the original bailor now has title to the goods and is entitled to delivery of them'.⁴¹ The underlying legal mechanism is estoppel. The bailee, having acknowledged to X that X is entitled to claim delivery from them as bailor⁴² or to have goods dealt with on particular terms,⁴³ and hence that in reality they possess on behalf of X, is precluded from going back on that acknowledgement once it has been relied on.⁴⁴ Furthermore, where Y, a current bailor other than X, acquiesces in this process, then it can, it seems clear, be relied on as equivalent to a valid delivery of possession by them to X.⁴⁵ It is suggested that this exactly fits the case of the financing

37 F. Pollock, *Possession in the Common Law* (OUP, 1888), pp. 11–20.

38 [1971] 1 Lloyd's Rep 439.

39 Strictly speaking to an agent for the bank: but nothing turns on this.

40 See e.g. N. Palmer, *Bailment* (3rd edn, Sweet & Maxwell, 2009) Ch 25; D. Sheehan, *The Principles of Personal Property Law* (Hart, 2011), Ch 10.

41 See *The Gudermes* [1993] 1 Lloyd's Rep 311, at 324, per Staughton LJ; also *Dublin City Distillery Ltd v Doherty* [1914] AC 823, at 852, per Lord Parker, and generally N. Palmer, *Bailment* (3rd edn, Sweet & Maxwell, 2009), Ch. 25; D. Sheehan, *The Principles of Personal Property Law* (Hart, 2011), Ch. 10. (However, for some scepticism, see *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, at 448, per Lord Devlin.)

42 Such an acknowledgment *by the bailee* is necessary: a mere request to the bailee by the person presently entitled will not do. See *Laurie & Morewood v Dudin & Sons* [1926] 1 KB 223, esp. at 237 (Scrutton LJ).

43 As in *The Gudermes* [1993] 1 Lloyd's Rep 311 (where, however, the claim failed on the facts).

44 N. Palmer, *Bailment* (3rd edn, Sweet & Maxwell, 2009) Ch. 25; see too *Laurie & Morewood v Dudin & Sons* [1926] 1 KB 223, at 237, above.

45 'Where the third party is a warehouseman the direction usually takes the form of a delivery order and the acknowledgment of a warrant for delivery of the goods or an entry in the warehouse books of the name of the pledgee as the person for whom the goods are held. The acknowledgment, whatever its form, does not change the nature of the warehouseman's possession. He still holds as bailee, but for the pledgee instead of the pledger. He has simply attorned to the pledgee.' – *Dublin City Distillery Ltd v Doherty* [1914] AC 823, at 852 (Lord Parker). See too *Official Assignee of Madras v Mercantile Bank of India* [1935] AC 53, at 58–59 (Lord Wright). This rule achieves statutory recognition in a slightly different context in s. 29(4) of the Sale of Goods Act 1979, allowing delivery through the mechanism of attornment by a third party in actual possession.

bank acting as consignee under a sea waybill. The carrier (the bailee) has, after all, received the goods from the shipper (the bailor) and then issued a document at the shipper's request, under which the carrier agrees to deliver to the bank and the bank alone, and (because of the Carriage of Goods by Sea Act 1992) in such a way as to give the bank the right to enforce all the terms of the contract of carriage, including the right to delivery.⁴⁶ What more, one might ask rhetorically, could one ask for by way of an intent to attorn? Indeed, it may also be possible for the bank to go further and rely on attornment in another way. The attorning party may be not the bailee but the owner in possession themselves, provided there is not simply a book entry⁴⁷ but a sufficiently explicit agreement making it clear that they now physically hold the goods only for, and to the order of, the person to whom they have attorned.⁴⁸ There are a number of cases suggesting that such an agreement may be inferred from the deposit of a document other than a full document of title, such as a warehouse⁴⁹ or other⁵⁰ receipt.⁵¹ If this is true, it is suggested that, *a fortiori*, there is no reason not to take the deposit of a sea waybill made out to a bank as clear evidence of an intent that any rights of the buyer are merely held for the benefit of the bank.

The third reason for suggesting that taking a sea waybill may give sufficient possession is perhaps more negative, but none the worse for that. In the scenario envisaged here, if it is argued that the lender-cum-consignee is not in possession of the goods as a matter of law, then who is? It is not easy to find a convincing candidate. The buyer-borrower no doubt has rights against the shipper under the contract of sale; but this is the limit of their participation. Apart from this they have been effectively written out of the deal, and are not even mentioned in the transport document (save perhaps as a notify party). Absent both effective control and any relationship with the carrier, it is submitted that they can be eliminated. The shipper-cum-seller is slightly more promising, having originally contracted with the carrier. But their contract with the carrier makes it clear that they

46 C. Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel, 2009), at 2.8, 2.27.

47 *Dublin City Distillery Ltd v Doherty* [1914] AC 823, at 852, per Lord Parker.

48 See *Martin v Reid* (1862) 11 CB (NS) 730, at 734–735, per Erle CJ (though there was a part delivery); *Dublin City Distillery Ltd v Doherty* [1914] AC 823, at 852, per Lord Parker; also the Hong Kong decision in *Re Hang Fung Jewellery Co Ltd* [2010] 2 HKLRD 1 at [37]. The precise distinction between a mere book entry and an agreement changing the character of possession is a fraught point, but need not be gone into here. See too R. Goode, *Legal Problems of Credit and Security* (4th edn, Sweet & Maxwell, 2013), at 1–54.

49 See e.g. *Martin v Reid* (1862) 11 CB (NS) 730; *Dublin City Distillery Ltd v Doherty* [1914] AC 823. To the extent that this is inconsistent with the result in *Inglis v Robertson* [1898] AC 616, it is suggested that this was a Scots case, whereas the attornment referred to here is an English law doctrine. But on this cf. now C. Anderson, 'Delivery of goods in the custody of a third party: operation and basis' (2015) 19 Edin LR 165.

50 See the Hong Kong decision in *Re Hang Fung Jewellery Co Ltd* [2010] 2 HKLRD 1, holding on the basis of suggestions in *Re Far East Structural Steelwork Engineering Ltd* [2010] 1 HKLRD 156 that this was the effect of a buyer's deposit of a receipt issued by him in favour of his own seller. The issue is discussed in P. Yung, 'Pledge by constructive delivery in Hong Kong' (2013) 24 ICCLR 273.

51 Furthermore, what authority there is suggests that the timing is not vital: an attornment will be effective once the goods come into the buyer's hands even if the agreement was entered into previously. See the old case of *Holl v Griffin* (1833) 10 Bing 246 and the more recent Hong Kong decision in *Re Hang Fung Jewellery Co Ltd* [2010] 2 HKLRD 1.

personally disclaim any right to control what happens to the goods, and in certain cases may indeed go further and state that they contract as agent for the consignee (lender). As for the carrier themselves although for some purposes they may be in possession, they can fairly clearly be eliminated: they are acting on others' orders and claim no right to dictate the fate of what they carry.

13.3 Other carriage documents: air waybills, CMR consignment notes and the like

We mentioned above that one very good reason for discussing the use of sea waybills as security was that they were similar in analysis to air waybills, CMR consignment notes, CIM documents and the like, and hence that any conclusions reached in relation to the former might well apply to the latter too. It is now time to make good on this suggestion.

To begin with, as regards the right of a named consignee to enforce the terms of the contract of carriage, the position here is indeed essentially the same as with sea waybills. Although for obvious reasons non-marine documents are untouched by the Carriage of Goods by Sea Act 1992, generally speaking the underlying convention schemes give much the same result by allowing the consignee to claim delivery to itself and to no one else and, inferentially, to complain if the goods are not delivered, short-delivered or delivered other than in one piece.⁵² Furthermore, with the exception of conclusivity *vis-à-vis* a buyer, the same generally goes for the right of a consignee to rely on statements in the transport document as to quantities and apparent condition.⁵³

Concerning the right of the consignor to divert the goods, the consignor under CMR and other conventions remains master of the goods until arrival, in exactly the same way as with sea waybills.⁵⁴ But by a neat irony the consignee, if in possession of the relevant documents, is, if anything, even better protected here than with a sea waybill. Under the CMR, the consignee's means of protection are twofold. First, the consignor's right is subject to any contrary notation in the consignment note.⁵⁵ Second, even where the consignor does have the right to change the destination of the goods, they cannot do so without giving up their own copy of the consignment note: a carrier who accedes to their demand without

52 Road: see CMR Art. 13 ('After arrival of the goods at the place designated for delivery, the consignee shall be entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods'). Rail: see COTIF/CIM (1999), Art. 44.1 ('[A]ctions based on the contract of carriage may be brought . . . by the consignee . . .'). Air: see Montreal Convention 1999, Art. 14 ('The consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name . . .'). The provision in the previous Warsaw Convention 1929 is similar, also contained in Art. 14.

53 Road: CMR, Art. 9.2 (prima facie evidence of condition, number of packages and marks). Rail: CIM, Art. 12 (same, if goods loaded other than by consignee). Air: Montreal 1999 and Warsaw 1929, Art. 11.2 (*prima facie* evidence of weight, dimensions, packing and apparent condition).

54 Road: CMR, Art. 12. Rail: CIM, Art. 18. Air: Montreal 1999 and Warsaw 1929, Art. 12.

55 Art. 12.3 ('The consignee shall, however, have the right of disposal from the time when the consignment note is drawn up, if the sender makes an entry to that effect in the consignment note').

demanding it is explicitly made liable to the consignee for any loss.⁵⁶ The implication is obvious. A lender who demands possession of the consignor's note and insists on a waiver of any right of diversion has as good a right of control as anyone can expect: the consignor who has given up their note to the lender *ex hypothesi* cannot present it to the carrier to substantiate a demand to divert the goods. The CIM, while it does not allow the right of control to be waived in the consignment note, has a similar provision requiring its production by a consignor wishing to exercise their rights;⁵⁷ and the same goes for the Montreal and Warsaw Conventions.⁵⁸

If this is right, then it is difficult to see any reason to distinguish between the characteristics of sea waybills on the one hand, and those of other international carriage documents on the other. If the former give the lender as good a security as they can reasonably expect in the case of the consignee's insolvency, then so do the latter.

13.4 An addendum: the possibility of non-possessory security

So far, we have been arguing that in the situation where a sea waybill is made out in favour of a buyer's bank as consignee, there is an overwhelming case for regarding the bank as having sufficient possession of the underlying goods to make good its claim to be a traditional pledgee – from which it follows that concerns as to the adequacy of the sea waybill as security for goods are seriously overstated. But the argument does not necessarily stop there. Assume, for the sake of argument, that this argument fails: for some reason or other a bank, albeit in possession of a sea waybill, cannot establish a possessory pledge. There may be insufficient evidence in the particular circumstances of any intent to deliver goods to the carrier as agent for it, or (quite plausibly) parties with inadequate advice may have made an inept attempt to create security by simply leaving with the bank a sea waybill made out in favour of the buyer as consignee. If a contest arises between the bank and the lender's creditors, is the bank's case necessarily hopeless? Or might it be open to the bank to argue that it has the benefit of some other *non-possessory* security, such as – in particular – an equitable charge?

The usual assumption made by commercial lawyers is that such an argument must be a non-starter, and that in all situations of this sort it is a case of possessory security or nothing. The point likely to be made immediately is that, whatever the parties' intention, a non-possessory security of this kind would be a registrable company charge.⁵⁹ A closer look, however, shows that this kind of lazy thinking

⁵⁶ CMR, Arts. 12.5(a), 12.7.

⁵⁷ CIM, Arts. 19.1 and 19.2.

⁵⁸ Art. 12.3 (in both cases).

⁵⁹ Compare the old case of *Re David Allester Ltd* [1922] 2 Ch 211 (trust receipt arrangement over bill of lading would have been struck down for non-registration had not financier been deemed still in possession under the principle in *North Western Bank v Poynter* [1895] AC 56). See also the Hong Kong decision in *Re Far East Structural Steelwork Engineering Ltd* [2010] 1 HKLRD 156 (pledge of cargo receipt, not being bill of lading, would have been caught by Hong Kong registration provisions as a would-be bill of sale, but for local statutory exception).

will no longer do. The UK charges registration regime under Part 25 of the Companies Act 2006 is actually now a very limited one: in particular, since legislative changes in 2013, the only entities affected by it at all are UK-registered companies.⁶⁰ For all other corporations (and it is worth bearing in mind that the vast majority of international trade cases handled in London concern non-UK entities with no connection whatever with England apart from a taste for its law), it follows that, even in respect of goods actually in England,⁶¹ we are back to the free-for-all for non-possessory security which existed in English law before the introduction of the original registration regime under the Companies Act 1900.

An alternative assumption is that in any case such a result would be inconsistent with *Inglis v Robertson*,⁶² referred to above; after all, if sound, such an argument would equally have applied to validate the security in that case. But this will not do either. *Inglis* was a decision from Scotland, applying Scots law to property in Glasgow. And though the rules as to pledges are the same in Scotland as in England, equitable charges of the kind in issue here were (and are) not generally recognised in Scots law.

The question is therefore essentially reduced to one of intention. Can a sufficient intent to create an equitable security be found where what the parties presumably envisaged was something different, more in the nature of a pledge? Despite one negative suggestion in a recent Hong Kong decision,⁶³ it is suggested that what relevant authority there is leads to the answer Yes. Something over a hundred years ago, in *Re Hamilton Young & Co*,⁶⁴ Lancashire cotton dealers owned cloth then in the hands of bleachers. Pending receipt and pledging of the bills of lading which would be issued once the goods had been finished, recovered and shipped, the dealers handed over the bleachers' receipts as security to the bank financing them. When the dealers collapsed, the issue arose of the validity of the security. Although most of the discussion hinged on the effects of the Bills of Sale Acts (which were held inapplicable), Vaughan Williams LJ had no doubt that, even if the receipts transferred no possessory rights, the bank 'had in equity a right to an injunction restraining [the dealers] from doing anything inconsistent with their holding the goods on account of the bank and under lien to the bank'.⁶⁵ And this conclusion was later supported by the Privy Council in a fairly similar case in 1935, *Official Assignee of Madras v Mercantile Bank of India*.⁶⁶ Railway receipts for groundnuts

60 The Act's provisions apply 'where a company creates a charge' (s. 859A(1)), and 'company' is specifically defined as a UK-registered company (s. 859A).

61 Under a previous version of the scheme, a charge by an overseas company over property in England had been subject to registration, at least where the company did business here. But this requirement has now been swept away. See generally P. Graham, 'Registration of company charges' [2014] JBL 175, at pp. 183–184.

62 [1898] AC 616. Although this was a Scottish case, the law on pledge is essentially the same on both sides of the Tweed, and hence the treatment of the issues is equally valid for England.

63 See *Re Far East Structural Steelwork Engineering Ltd* [2010] 1 HKLRD 156 at [92], per Yuen JA; also *Re Hang Fung Jewellery Co Ltd* [2010] 2 HKLRD 1 at [46]–[51], per Kwan JA.

64 [1905] 2 KB 772.

65 [1905] 2 KB 772, at 784. See too *Ex parte North Western Bank* (1872) LR 15 Eq 69, at 73 (letter to bank promising to hand over warehouse warrants for wool would amount to immediate equitable charge).

66 [1935] AC 53.

were deposited with a bank, once again pending shipment. The main holding was that certain Indian legislation, which does not exist in England, gave the receipts the same status as bills of lading and, hence, the bank's security was good. But the Privy Council also accepted that even if there was no valid pledge, there would have been an equitable charge. As Lord Wright put it:

A still further point was raised on behalf of the respondents; it was argued that if under [the legislation] the respondents did not get a good pledge at law by the delivery of the railway receipts, still that delivery, considered on all the facts of the case, was evidence of a good equitable charge at least as between the immediate parties [. . .]. That argument found favour with the Appellate Court, and their Lordships think it is well founded. Even if the documents of title are regarded as merely tokens of an authority to receive possession, it seems that their transfer for value by way of security for advances must at least raise an equity as between transferor and transferee entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts; if so, the appellant must be subject to the same equity.⁶⁷

Similarly, in other cases events which *ex facie* have nothing to do with equitable charges, such as retentions of non-negotiable documents like mate's receipts,⁶⁸ deposits of non-documents of title⁶⁹ or bills of lading unendorsed⁷⁰ or even mere agreements to allow goods to be removed,⁷¹ have been characterised by the courts with little difficulty as intended to create an equitable security. In these circumstances it seems highly likely that, even if a court was not convinced that a given deposit of a sea waybill was a pledge, they would nevertheless hold that it was a good equitable security. Of course, there are disadvantages to a security being equitable: in particular, the lender will be deprived of any recourse against third parties obtaining an interest in the goods without notice, which is not the case with pledgees.⁷² But for a risk-averse banker, it is considerably better than nothing at all.

67 Ibid. at 66–67. See too *Re Far East Structural Steelwork Engineering Ltd* [2010] 1 HKLRD 156 at [42], per Cheung JA.

68 *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429, esp. at 444–445, per Lord Wright.

69 *Re Far East Structural Steelwork Engineering Ltd* [2010] 1 HKLRD 156 (cargo receipt in favour of seller of goods).

70 *Ishag v Allied Bank International Ltd* [1981] 1 Lloyd's Rep 92, at 98, per Lloyd J.

71 *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58; [2002] 1 AC 336 at [53], per Lord Scott.

72 See *Barber v Meyerstein* (1869–1870) LR 4 HL 317.

PART 4

CONTEMPORARY ISSUES
IN CARGO INSURANCE

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CHAPTER 14

Cargo insurance and open covers

*Peter MacDonald Eggers QC**

14.1 Introduction

Open covers, and floating policies, are well-known insurance instruments in international trade and have been used for a long time. Open covers are commercially convenient, expedient, even if somewhat exotic, creations of the commercial mind. They are convenient because they enable both assured and insurer to make a contractual arrangement, specifying in advance the applicable terms for the insurance of multiple subject matters, whether ship, cargo, freight or liability risks. In this way, a commodity exporter, trader or importer whose business it is to ship numerous cargoes at numerous places at any time during a calendar year, can avoid negotiating a new and separate insurance contract for each cargo shipped, and make all the necessary arrangements at one time for the year under a facility whose terms (as to premium, limits, scope of cover, insuring conditions, special warranties and the like) are agreed when the open cover is placed. They are expedient because such instruments are variously adaptable, as reflected in the different types of cover available, ranging from fully obligatory floating policies to fully discretionary open-cover facilities.

The commercial advantages to each party of such open covers have been explained by the courts, especially with respect to floating policies. In *Glencore International AG v Alpina Insurance Co Ltd*,¹ Moore-Bick J referred to the advantages of special type of open cover, namely a fully obligatory open cover or ‘floating policy’, as follows:

This form of policy, under which goods in transit falling within the terms of the cover are automatically insured as soon as the policyholder acquires an interest in them, provides the flexibility and continuity of cover which are essential to enable a large trading organization to carry on business in the modern world. Commerce could not function efficiently if traders handling any significant volume of business had to negotiate separate terms for each individual shipment. Open covers also provide benefits for underwriters because they enable large numbers of similar risks to be underwritten without the need for individual presentations.

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¹ [2003] EWHC 2792 (Comm); [2004] 1 Lloyd’s Rep 111, at [10].

Open covers are exotic because they represent a commercial arrangement which has elements of an insurance contract, but, in truth, in most cases they are a contract for the making of future insurance contracts. It is for this reason why open covers are sometimes described as contracts *for* insurance, instead of contracts *of* insurance. Nevertheless, because they are and are not an insurance contract, they represent a challenge in certain respects to the application of marine insurance law. This chapter aims to take up the challenge and consider how principles of insurance law should be applied to open covers. With this as the aim, this chapter will consider: (i) the nature and types of open cover (including floating policies) and the impact of the Marine Insurance Act 1906, (ii) the function and nature of declarations under an open cover, (iii) the duty of utmost good faith and the duty of fair presentation with respect to an open cover, and (iv) insurable interest and open covers.

14.2 The nature and types of open cover

14.2.1 Terminology: ‘open covers’ and ‘floating policies’

It is worth trying to explain the terms ‘open covers’ and ‘floating policies’, as they are terms used occasionally interchangeably by judges, in some cases with no clear idea of what sort of instrument was being analysed. The earliest reference in the cases to the words ‘*open cover*’ I have found in the authorities is a decision of the Privy Council relating to an insurance facility purportedly agreed in 1885, but in that case the term was used to refer to the proposal or making of an insurance contract in advance for the shipment of a single cargo,² rather than to an contractual arrangement for the insurance of multiple cargoes. The first reference in the cases to an ‘*open cover*’ by which a number of subject matters could be declared under the facility appears in the 1890s, although that case concerned a reinsurance on ships.³ The first case in which an ‘*open cover*’, as now understood, was referred to in respect of cargo (coal) was decided in the early years of the twentieth century.⁴

A special type of open cover, called the ‘*floating policy*’, has an older lineage, or at least the name has an older lineage. The first time floating policies are referred to as such in the authorities appears to be in the 1830s.⁵ It may be that the later reference to ‘*open cover*’ was intended to refer to a floating policy. In his commentary on the Marine Insurance Act 1906, Sir Mackenzie Chalmers observed that

² *Bhugwandass v The Netherlands India Sea and Fire Insurance Company of Batavia* (1888) 14 App Cas 83.

³ *Home Marine Insurance Company Limited v Smith* [1898] 1 QB 829; [1898] 2 QB 351 (CA).

⁴ *Maritime Insurance Company v Stearns* [1901] 2 KB 912. See also *Assicurazioni Generali de Trieste v Empress Assurance Corporation Limited* [1907] 2 KB 814 (cargo reinsurance); *Genforsikrings Aktieselskabet v Da Costa* [1911] 1 KB 137 (cargo reinsurance); *Bank of New South Wales v South British Insurance Company Ltd* (1920) 4 Ll L Rep 384.

⁵ *Donaldson v Manchester Insurance Co* (1836) 14 S 601 (Ct Sess). See also *Waters v The Monarch Fire and Life Assurance Company* (1856) 5 El & Bl 870; *The North British and Mercantile Insurance Company v Moffatt* (1871) LR 7 CP 25; *Martineau v Kitching* (1872) LR 7 QB 436.

unvalued policies were often referred to by lawyers as ‘*open policies*’,⁶ but that the term ‘*open policy*’ was used in the mercantile community to refer to a ‘*floating policy*’.⁷

One sees a number of references to an ‘*open policy*’ in the nineteenth-century cases.⁸ Indeed, a further assay of the law reports reveals that contracts which are in essence open covers were known and approved by the Court of King’s Bench in the late eighteenth century, even though they were not called ‘*floating policies*’, ‘*open policies*’ or ‘*open covers*’.⁹ In *Henchman v Offley*,¹⁰ the assured arranged to take out two policies, the first for £6,000 on goods, at and from Bengal to London, on board any ship or ships which should have sailed on or between 1 September 1779 and 1 June 1780, and the second for £4,000 on goods, at and from Bengal to London, on board any ship or ships which should sail between 1 February and 31 December 1780. The assured declared to the first policy two cargoes, on the vessels *General Barker* and *Ganges*, which were eligible to be declared under either policy. The cargo on board *General Barker* was lost and the defendant underwriter argued that the second policy should contribute to the loss. The argument was rejected and a verdict was entered for the plaintiff assured. The court refused a new trial on this issue, because it ‘*thought the case very clear*’.

In *Kewley v Ryan*,¹¹ the merchant instructed its London agent to place a policy in respect of the cargo of cotton on board the vessel *Elizabeth* for a voyage from Grenada to England and ‘*on another cargo of cotton and other goods, which they intended to ship on board some other ship that should sail with the first convoy*’, and therefore directed the agent to place an insurance ‘*to be on ship or ships*’. An argument was advanced that the policy was not valid. The court, however, held that ‘*the legality of the policy on ship or ships was too well established both by usage and authority to be disputed*’. Intriguingly, the court also said that the assured ‘*had clearly a right to apply such an insurance to whatever ship he thought proper within the terms of it, for which the case of Henchman v. Offley was an authority*’.

6 See e.g. *Fitz-Gerald v Pole* (1754) Amb 214; (1754) 4 Bro 439, at 446; *Lewis v Rucker* (1761) 2 Burr 1167, at 1171 (Lord Mansfield); *MacNair v Coulter* (1773) 4 Bro 450; *Brough v Whitmore* (1791) 4 TR 206, at 210 (Buller J); *Usher v Noble* (1810) 12 East 639, at 646 (Lord Ellenborough CJ); *Irving v Manning* (1847) 1 HLC 287, at 307 (Pateson J); *Tobin v Harford* (1863) 13 CB (NS) 791, at 802 (Williams, J); (1864) 17 CB (NS) 528, at 536 (Blackburn J). It was also referred to in the argument of Erskine, Garrow and Park in *Thompson v Taylor* (1795) 6 TR 478, at 480: what a legal team that must have been!

7 M. D. Chalmers and D. Owen, *Marine Insurance Act 1906* (2nd edn, 1913), 45. It is because of this ambiguity that Chalmers used the terms ‘unvalued policy’ and ‘floating policy’ to avoid any confusion.

8 *Watson v Swann* (1862) 11 CB (NS) 756; *Gledstanes v The Corporation of the Royal Exchange Assurance* (1864) 5 B&S 797; *Ionides v The Pacific Fire and Marine Insurance Company* (1871) LR 6 QB 674; (1872) LR 7 QB 517; *Stephens v The Australasian Insurance Company* (1872) LR 8 CP 18; *Davies v National Fire Co of New Zealand* [1891] AC 485, at 491 (Lord Hobhouse). See also *Winter v Haldimand* (1831) 2 B&Ad 649. See also J. A. Park, *A System of the Law of Marine Insurance* (8th edn, 1842), at p. 221. In *Union Insurance Society of Canton v Wills* [1916] 1 AC 281, at 287, Lord Parmoor referred to an ‘*open or floating policy*’.

9 See also *Robinson v Touray* (1811) 3 Camp 158.

10 (1782) 3 Dougl 135.

11 (1794) 2 H Bl 343, 347–348. See J. A. Park, *A System of the Law of Marine Insurance* (8th edn, 1842), at pp. 20–21.

These early authorities contemplate that floating policies, or open covers, could grant some discretion or choice to the assured to declare risks under the facility. The alternative was that there may be some automatic attachment of risk in some instances. It appears reasonably clear that no fixed meaning was attached to ‘floating policies’, ‘open covers’ or ‘open policies’ while the matter rested solely with the courts in the nineteenth century. For the purposes of this chapter, it is suggested that an open cover is a contract between the insurer and the assured which allows the insurance of multiple subject matters, at different times within the period of cover, by stipulating the terms of such insurance in advance of the attachment of cover to each subject matter, and that a floating policy is a special type of an open cover, it being fully obligatory on the part of both the insurer and the assured. As explained below, a floating policy has this additional characteristic, namely when it is fully obligatory the open cover – the floating policy – represents a contract of insurance. In the case of an open cover which is not fully obligatory, the insurance contract is formed only when a declaration is made and/or accepted, as required by the open cover, or when some other mechanism for the making of the insurance contract is complied with. Nevertheless, one should not apply such terminology too inflexibly, as insurance practitioners, lawyers and judges may well use these terms more loosely.¹²

Open covers bear a distinct similarity to reinsurance treaties, which likewise accommodate multiple risks, as opposed to single or facultative risks, depending on the cession of the risks to the treaty, either automatically or by way of the re-assured’s election, whether by declarations, bordereaux or otherwise.¹³ Principles developed in connection with declarations under reinsurance treaties in many cases may be applied to open covers.

14.2.2 *Floating policies under the Marine Insurance Act 1906*

These early authorities referred to above, namely *Henchman v Offley* and *Kewley v Ryan*, do not deal with floating policies in the sense as they are now understood by virtue of the Marine Insurance Act (MIA) 1906. The curiosity is that given that open covers were well known to the commercial and maritime community since the late eighteenth century, reference is made in the MIA 1906 to floating policies, but not to open covers generally. Chalmers was plainly aware of the decision in *Kewley v Ryan*, as he refers to it,¹⁴ but he takes its purport to be overridden by section 29 of the MIA 1906 which deals with floating policies. Under that section, floating policies oblige the assured to declare all cargoes or ships which fall with the parameters of the floating policy ‘in the order of despatch or shipment’, and in the case of cargo the declaration must ‘comprise all consignments within the

12 For example, in *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd’s Rep 288, at 296–297 (Anthony Colman QC), the deputy judge referred to a non-fully obligatory open cover as a ‘floating policy’, indeed one which is recognised by section 29 of the Marine Insurance Act 1906.

13 See *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd* [2001] UKHL 51; [2002] 1 Lloyd’s Rep 157, at [25]–[26] (Lord Steyn) and [70]–[71] (Lord Millett).

14 M. D. Chalmers and D. Owens, *Marine Insurance Act 1906* (2nd edn, 1913), at p. 47.

terms of the policy'. Whatever the reason, the MIA 1906 is notable in omitting express reference to open covers generally. Nevertheless, the pre-Act authorities reveal that open covers were known both to the insurance and commercial community in the nineteenth century and beforehand and that floating policies were not as straight-jacketed as the 1906 Act suggests: floating policies were not always understood as being fully obligatory, and it seems that Chalmers as draftsman made a positive decision to render floating policies as fully obligatory, at least as a default position.¹⁵

Section 29(1) defines a floating policy to be '*a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration*'. Section 29(3) provides that '*unless the policy otherwise provides*', the declaration must be made in the order of despatch or shipment and, in the case of goods, must comprise '*all consignments within the terms of the policy*'. That sub-section goes on to provide that the value of the goods or other property must be honestly stated and that an omission or erroneous declaration may be rectified even after loss, provided that the omission or declaration was made in good faith.¹⁶ Section 29(4) provides that, unless the policy otherwise provides, where a declaration is made after loss, the policy must be treated as an unvalued policy as regards the subject matter of the declaration in question.¹⁷

In essence, therefore, under the MIA 1906, a floating policy has the following characteristics: (a) the policy describes the general terms (applicable conditions) of the insurance; (b) the policy provides for the insurance of multiple ships or consignments; (c) each ship or consignment allocated or appropriated to the policy must be allocated or appropriated by declaration (which by section 29(2) may be made by indorsement on the policy or in some other customary manner); and (d) the declaration of risks by the assured is obligatory, as is evident by the fact that declarations must be made in order of shipment and in respect of '*all consignments*'. The fact that the declarations must be made in the order of shipments is significant because in most cases the financial limits of the floating policy reduce as and when each risk is declared.¹⁸

As to the obligatory nature of the floating policy, the contract requires the insurer to accept the declarations made, provided that the property declared falls within the general terms of the floating policy.¹⁹ In addition, the assured is obliged to declare a risk under the floating policy. Given this dual obligation to make and accept declarations, the insurance contract is necessarily formed when the floating policy is agreed and not when the declaration is presented. However, the obligatory status of a floating policy had been analysed by the courts before the MIA 1906

¹⁵ Ibid. at. p. 47.

¹⁶ *Robinson v Touray* (1811) 3 Camp 158, at 159–160 (Lord Ellenborough).

¹⁷ *Harman v Kingston* (1811) 3 Camp 150, at 152 (Lord Ellenborough).

¹⁸ *Dunlop Brothers & Co v Townsend* [1919] 2 KB 127, at 134 (Bailhache J); *The Beursgracht* [2001] EWCA Civ 2051; [2002] 1 Lloyd's Rep 574, at [30] (Tuckey LJ).

¹⁹ *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674, at 682–683 (Blackburn J); (1872) LR 7 QB 517; *Davies v National Fire Co of New Zealand* [1891] AC 485, at 491–492 (Lord Hobhouse).

in less certain terms. In *Iomides v Pacific Fire & Marine Insurance Co*,²⁰ Blackburn J said that:

The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description, if any there be, in the policy, on the voyages specified in the policy, to which the assured elects to apply the policy. The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy. The assent of the assurer is not required to this, for he has no option to reject any vessel which the assured may select.

This suggests that the obligation is on the insurer to accept the declaration, but not on the assured, who has the choice (election) to declare or not to declare the cargo under the policy. This option available to the assured was repeated by the now-ennobled Lord Blackburn in *Inglis v Stock*,²¹ when he referred to the assured having ‘insured himself by floating policies’ for £4,000, part of £5,000, on sugar ‘to be hereafter valued and declared’ from European ports to Bristol. Lord Blackburn said:

The meaning of to be ‘hereafter valued and declared’ is, that if the insured has several adventures, all within the description in the policy, out, he may select at his pleasure which is to be protected by the policy; and, on his giving notice of such a selection to the insurers, the policy is as if it had named that adventure from the beginning. Of course, if adventures have been previously named, these come first, and whether those prior subjects of insurance are lost or not, the policy is equally pro tanto functus officio. And I believe the practice is if there is nothing to shew that the first adventure which came in safe was selected not to be under the policy, it is taken to be so, though there is no declaration.

This judgment indicates that there may have to be a positive declaration not to select, i.e. to de-select, a cargo for appropriation to the policy, otherwise it will be deemed to have been selected. This suggests that the assured had an option to decide whether or not the policy should apply to the cargo. It also suggests that the floating policy’s upper financial limit will reduce as and when each cargo is declared.

Nevertheless, there appears to have developed a practice, which may have been alluded to by Lord Blackburn, that the assured was obliged to declare all shipments falling within the parameters of the policy or at least to opt out if the assured did not want to declare a cargo under the floating policy. The obligation upon the assured appears to be established in *Stephens v The Australasian Insurance Company*.²² In that case, the assured was a shipowner who had taken out a floating policy on cargoes it carried to protect itself against the risk of jettison. Shipments had been declared by the assured under the floating policy. One cargo of 102 bales of cotton shipped on board the assured’s vessel at Alexandria was not declared by the assured, because it was thought or intended that the shipment would be carried on deck at the shipper’s risk, but it was discovered that a clean bill of lading was issued in respect of the cargo. After the loss of the cargo, the assured sought to declare the

20 (1871) LR 6 QB 674, at 682–683 (Blackburn J); aff’d (1872) LR 7 QB 517.

21 (1885) 10 App Cas 263, at 268–269 (Lord Blackburn).

22 (1872) LR 8 CP 18, at 19–20, 23–24 (Brett J). See also *The Imperial Marine Insurance Company v The Fire Insurance Corporation Limited* (1879) 4 CPD 166.

shipment under the floating policy. The court held that the cargo was covered by the floating policy, notwithstanding the lack of an earlier declaration. Brett J quoted the statement of insurance practice which formed part of the case as follows:

According to the usage of the insurance business, when a policy is effected on goods by ship or ships to be thereafter declared, the policy attaches to the goods as soon as and in the order in which they are shipped; and directly the assured knows of the shipment of the goods he is bound to declare them to the underwriter on the policy, and to declare them in the order in which they are shipped. He is not entitled to declare some of the risks, and remain his own insurer as to the others. In case by oversight or otherwise the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations and make them correspond with the order of shipment. The underwriter would require to see the bills of lading, and could insist on the declarations being made to follow the sequence of the bills of lading. The declarations are often thus rectified, and sometimes even after loss.

Brett J then went on to explain the significance of this practice as follows:

The next question raised, is whether Chapple & Co. were insured in respect of the risk on the 102 bales of cotton on board the Behera. Now the usage stated in the case is a large usage, more comprehensive, we believe, than it has been proved or assumed to be in any of the cases which are in the books relative to this matter; but if it is not unreasonable, it is binding on the Court in this case. We are not prepared to say it is unreasonable; it follows that it is binding. Then it seems clear that Chapple & Co. were insured by the policies . . . for the 102 bales on board the Behera were shipped on board on the 20th of December, 1864, when the policies were not exhausted by prior shipments to which they were applicable, and Messrs. Chapple & Co. were bound to rectify the declarations, and make them correspond with the order of shipment. It seems to us that the usage, as now stated, makes the case of *Gledstanes v Royal Exchange Assurance*, and *Ionides v Pacific Insurance Co.* inapplicable. But if that be not so, we still think the plaintiffs, on the statements made in this case, are entitled to recover. The doctrine to be deduced from those cases is that, according to the usage of merchants and underwriters, as recognized by the Courts without formal proof in each case, a declaration of this kind, which it is the right of the assured to make without the consent of the underwriter, may be altered even after the loss is known, if it be altered at a time when it can be, and is altered innocently and without fraud.

Chalmers relied upon this decision in support of his formulation of section 29(3) of the MIA 1906.²³ As a result, under the 1906 Act, floating policies have been regarded as fully obligatory policies insuring multiple cargoes provided that (a) they fall within the scope of the policy, and (b) the financial limits of the policy have not been depleted by reason of earlier declarations. In other words, they are obligatory from the perspective of both the insurer and the assured.²⁴ As discussed below, although section 29 appears to require the making of a declaration, a declaration is not critical to the effective insurance of a vessel or consignment falling within

23 M. D. Chalmers and D. Owens, *Marine Insurance Act 1906* (2nd edn, 1913), at 46.

24 *Dunlop Brothers & Co v Townsend* [1919] 2 KB 127, at 134 (Bailhache J); *The Beursgracht* [2001] EWCA Civ 2051; [2002] 1 Lloyd's Rep 574, [26]–[32] (Tuckey LJ); H. Bennett, *The Law of Marine Insurance* (2nd edn, OUP, 2006), para. 2.29.

the scope of the policy. In fact, section 29 suggests as much in that it allows declarations to be made after the relevant loss has occurred.

14.3 Nature of open covers generally

As the MIA1906 sought to codify the law of marine insurance as it stood in 1906, one might be forgiven for thinking that the only type of open cover known to the legal and commercial communities was the floating policy. However, as explained above, the open cover, in substance if not in name, was well known to those communities during the eighteenth and nineteenth century before the passing of the 1906 Act. Given that section 29 of the 1906 Act essentially renders a floating policy as a fully obligatory contract insuring multiple subject matters, an open cover can be defined more expansively, to include but not to be limited to floating policies.

Thus, an open cover is a contract (a) which describes the general terms (applicable conditions) of the insurance; (b) which allows for the insurance of multiple ships or consignments; (c) by which each ship or consignment allocated or appropriated to the contract is allocated or appropriated by declaration; and (d) which may oblige the insurer and/or the assured to make or accept declarations under the contract or may allow either or both parties a discretion whether or not to make or accept declarations. This last characteristic is one of some significance.

If the open cover obliges both the insurer and the assured, it is in essence a floating policy. In addition, it may be said that the floating policy itself is the contract of insurance. If, however, the open cover obliges the insurer to accept declarations, leaving it to the discretion or election of the assured to decide, as he or she chooses, whether to make the declaration, the making of the declaration by the assured in essence operates to conclude the insurance contract at the time the declaration is communicated to the insurer; the declaration operates as an acceptance of an irrevocable standing offer made by the insurer to insure such vessels or consignments as are declared.²⁵ Such a facility is often referred to as a ‘*facultative/obligatory*’ cover, especially in the reinsurance market. Nevertheless, the term is also used to refer to open covers covering direct marine risks. Thus, in *The Beursgracht*,²⁶ Tuckey LJ said that ‘a “*facultative/obligatory*” cover is also described as a form of open cover. Such a cover gives the assured a facility to declare risks to the cover at his option, although the underwriter is bound to accept declarations if they fall within the terms of the cover.’

If the open cover obliges the assured to make declarations, but allows the insurer a discretion to decline the declaration, the insurer’s communicated acceptance of

²⁵ *Citadel Insurance Co v Atlantic Union Insurance Co SA* [1982] 2 Lloyd’s Rep 543, at 547–548 (Kerr LJ) (hull reinsurance); *The Tiburon* [1990] 2 Lloyd’s Rep 418, at 422 (Steyn J) (hull); *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd’s Rep 288, at 296–297 (Anthony Colman QC) (shipbuilding); *BP plc v GE Frankona Reinsurance Ltd* [2003] EWHC 344 (Comm); [2003] 1 Lloyd’s Rep 537, [82]–[86] (Cresswell J) (construction).

²⁶ [2001] EWCA Civ 2051; [2002] 1 Lloyd’s Rep 574, [22] (Tuckey LJ).

the declaration would operate to conclude the contract of insurance upon such acceptance. Such open covers, while possible, are less common. Where the insurer has the option to accept or decline the declaration, the decision is often delegated to the leading insurer by way of a ‘*follow the leader*’ clause.²⁷

It is also possible that the open cover allows both of the assured and the insurer to decide whether or not to make or accept the declaration. If a declaration is made and accepted, a contract of insurance will be concluded on that date, and its terms may be incorporated by reference to the open cover. However, in that case, it is questionable whether the open cover represents a contract at all.²⁸ By contrast, where the open cover obliges the assured or the insurer to make or accept a declaration, the open cover will very often be a contract, but a contract *for* insurance rather than a contract *of* insurance.

There may also be hybrid open covers, for example the contract may oblige both the insurer and the assured to accept and make declarations, but the assured may have the option to obtain extensions of cover, at an additional premium. For example, the open cover may provide for insurance against transport or transit risks, in respect of which the insurer and the assured must accept and make declarations, but the assured may have a discretion to obtain additional insurance by declaration against storage risks.²⁹

An open cover which is not a floating policy differs from a floating policy in two critical respects. First, the open cover is a contract *for* insurance, not a contract *of* insurance, whereas the floating policy is a contract *of* insurance. This is significant when it comes to issues concerning the parties’ duty of full and accurate disclosure, as will be discussed below. Second, as a matter of practice, the aggregate financial limits of the open cover are not as often reduced or exhausted by the earlier declarations being made, although there may well be individual declaration limits and/or aggregate limits.

The terms of any resulting insurance contract made pursuant to the open cover, whether floating policy or otherwise, will depend on the proper construction of the terms of the open cover and the declaration made thereunder. In this context, it is plainly important that the parties to the open cover are the same as the parties to the declaration made under the open cover. If that is the case, there is little room for the excision of terms in the open cover in determining the terms of the insurance contract. Accordingly, it is likely that the declaration will incorporate all of the apposite terms of the open cover, unless they are at odds with the declaration.³⁰ Certainly, any exercise in contractual construction should not be hidebound

27 *Mander v Commercial Union Assurance Company plc* [1998] Lloyd’s Rep IR 93, at 143–144 (Rix J).

28 Brokers’ open covers often operate in this way. In *The Tiburon* [1990] 2 Lloyd’s Rep 418, at 422 (Steyn J), it appears that a broker’s open cover was in issue, which the court considered represented an ‘*irrevocable standing offer*’ by the hull insurer, although there is little analysis of the contract. See also *Berger & Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd’s Rep 442, at 460 (Kerr J).

29 See *Glencore International AG v Alpina Insurance Co Ltd* [2003] EWHC 2792 (Comm); [2004] 1 Lloyd’s Rep 111. In this case, at para. 10, the court referred to the commercial advantages of an ‘*open cover*’, but was probably intending to refer to a floating policy.

30 *Evalis SA v SLAT* [2003] EWHC 863 (Comm); [2003] 2 Lloyd’s Rep 377, [36] (Andrew Smith J); cf. *Macleod Ross and Co v Cie d’Assurance Generales l’Helvetia* [1952] 1 Lloyd’s Rep 12 (open cover and insurance certificate).

to any inflexible rule of construction. If the declaration's terms contradict or exceed the terms of the open cover, the terms of the declaration, if accepted by the parties, will ordinarily predominate, and the insurer or the assured who is otherwise obliged to make or accept the declaration would then be free to decide whether or not to agree to the declaration.³¹

Having regard to the variety of open covers, it is somewhat curious that only floating policies – obligatory/obligatory open covers – are referred to in the Marine Insurance Act 1906. Yet section 29 does provide '*unless the policy otherwise provides*', meaning that section 29 operates as a default position with respect to open covers.³² That may mean if, as is often the case, it is not clear whether or not the open cover imposes an obligation on the assured or insurer to make or accept declarations, by the operation of section 29, the facility will be treated as fully obligatory. The 1906 Act, however, provides little assistance in understanding the nature and effect of non-floating policy open covers.

14.4 The function and nature of declarations

14.4.1 *The function of a declaration under a floating policy*

Section 29 of the MIA1906 refers to the making of declarations under a floating policy. In circumstances where a floating policy obliges both parties to the contract to make and accept declarations, where the relevant vessels or consignments fall within the description of the subject matter and the scope of cover under the policy, there is little that the declaration under the floating policy will achieve for the purpose of appropriating a particular shipment to the policy. For example, if the policy insures all cargoes of bananas shipped from Central America to European ports during a specified calendar year, the floating policy automatically attaches to each shipment of bananas falling within the terms of the policy. The declaration is unnecessary in order to attach such cover.³³ Indeed, sections 29(3) and 29(4) say as much.

In *Dunlop Brothers & Co v Townend*,³⁴ a floating policy was procured by the assured '*upon produce and/or merchandize to be thereafter declared and valued as per marine policy from various ports in the East to any ports in the United Kingdom*' as an insurance against war risks. The assured was accustomed to declare all of its goods to this policy, except for those goods insured under the '*Government scheme of war risks insurance*'. The assured had declared a cargo of raisins being carried from Bombay to Liverpool under a floating policy, which cargo was lost by enemy action in 1917. The assured's agents (the plaintiffs) commenced proceedings under the policy. The defendant insurers denied that they were liable to indemnify the assured, because had the cargoes insured by the government scheme been declared under

31 *The Tiburon* [1990] 2 Lloyd's Rep 418, at 422 (Steyn J).

32 It may be for this reason that the deputy judge in *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288, at 296–297 (Anthony Colman QC) referred to a non-fully obligatory open cover as a floating policy within the meaning of section 29.

33 *Stephens v The Australasian Insurance Company* (1872) LR 8 CP 18.

34 *Dunlop Brothers & Co v Townend* [1919] 2 KB 127.

the floating policy, the policy would have been exhausted (the financial limits depleted) before the shipment of the lost raisins. The court held that as the assured was obliged to declare all shipments falling within the policy description of the subject matter, the mere fact that the goods insured under the government scheme had not been declared under the floating policy did not mean that the floating policy had not attached to them. Accordingly, the policy had been exhausted prior to the loss. Bailhache J said:³⁵

As I understand the working of floating policies it is an essential principle that declarations must be made of all goods which come within the terms of the policy to which the interest intended to be covered at the time the floating policy is taken out attaches. See s. 29, sub-s. 3, of the Marine Insurance Act, 1906. The goods about which the question arises in this case were goods which came within the terms of the policy; they were goods to which the interest of the plaintiffs attached, but they were goods in respect of which the plaintiffs had instructions to insure with somebody else. The fact that they had instructions to insure these goods with somebody else seems to me to be wholly immaterial; it in no way affects their interest, and they could no more act on these instructions to the detriment of the defendant than they could select for themselves what goods they would declare and what goods they would not declare under the policy. It seems to me that this is really quite a plain case and upon the true construction of ss. 26 and 29 of the Marine Insurance Act, 1906, the plaintiffs ought to have made those declarations which the defendant says should have been made on this policy. If this is right then upon the facts which are admitted the policy has run off. The result is that there must be judgment for the defendant.

Similarly, in *The Beursgracht*,³⁶ the assured had obtained an open cover which was ‘not a cover of the facultative/obligatory type, but one which is more like a floating policy’ in respect of charterers’ liability risks. The assured was accustomed to make monthly declarations in respect of chartered vessels. However, after the assured entered into a charterparty in respect of the vessel *Beursgracht* for a voyage from Santos to Rotterdam in 1987, no declaration was made. In 1991, the assured was informed that proceedings had been commenced in Brazil in respect of the death of a stevedore. In 1992, the insurers were informed of the claim. The insurers declined liability on the ground that no declaration had been made under the policy. The assured subsequently made a declaration. The Court of Appeal held that as this was an obligatory floating policy, the declaration did not operate to effect insurance cover of each eligible risk; it happened automatically. As Tuckey LJ said, ‘the declaration does not bind the underwriter. He is bound automatically when . . . goods are shipped . . . nowhere does the wording link the making of declarations to the attachment of risk’. The declaration may serve other purposes, for example identifying the value of the cargo shipped or providing other information which the insurer requires to calculate the premium or to know the values at risk. Under section 29(4), if no value is declared prior to the loss, the insurance in respect of that cargo will be an unvalued policy. In *The Beursgracht*,³⁷ the court considered that even though it

³⁵ Ibid. at 134.

³⁶ [2001] EWCA Civ 2051; [2002] 1 Lloyd’s Rep 574, [30]–[34] (Tuckey LJ). See also *Hanzoha Non-Life Insurance Co Ltd v Alba Pte Ltd* [2011] SGHC 271; [2012] Lloyd’s Rep IR 505, [48] (High Court Singapore).

³⁷ [2001] EWCA Civ 2051; [2002] 1 Lloyd’s Rep 574, [32] and [34] (Tuckey LJ).

was not critical to the attachment of cover, the declaration was still an ‘essential part of the contractual machinery’ such that if there has been a failure to provide a declaration on the part of the assured, that itself may represent a breach of contract, entitling the insurer to damages or other relief.³⁸

Of course, it is possible that the fully obligatory floating policy will require a declaration to be made as a condition to the attachment of cover. Thus, in *The Beursgracht*,³⁹ Tuckey LJ said that if the commercial imperatives justified it, the insurers could have insisted on the making of the declaration as a condition of the attachment of cover. In *Union Insurance Society of Canton v Wills*,⁴⁰ a floating policy was concluded in respect of cargoes shipped from a large variety of ports (the United Kingdom, Europe, the American continent and the Asian continent) to Australian and New Zealand ports. The policy provided that ‘Declarations of interest to be made to this society’s agent at port of shipment where practicable or agent in London or Perth as soon as possible after sailing of vessel to which interest attaches’. The Privy Council held that this was a promissory warranty under the Australian equivalent of section 33 of the MIA 1906, such that any failure to make a declaration in accordance with the warranty discharged the insurers from the date of the breach. The Privy Council seemed to suggest that if the loss occurred prior to the time when a declaration was required to be made, there would be cover. In reaching this decision, the Privy Council did not allow the terms of section 29(3) (which allowed any error or omission to be rectified even after loss) or section 29(4) (which provided that a declaration made after loss would be treated as an unvalued policy) to cure the omission of a declaration within time, as required expressly by the contract. The Privy Council referred to section 29(3), but not to section 29(4). Lord Parmoor said that the ‘omission’ referred to in section 29(3) would not embrace a failure to make a declaration at all. By contrast, in *Dunlop Brothers & Co v Townend*,⁴¹ the court considered that section 29(3) allowed post-loss declarations to be made, because it was a fully obligatory cover. The Privy Council in *Union Insurance v Wills* plainly considered that the express wording of the policy overrode the default position in section 29.

14.4.2 *The function of the declaration under a non-fully obligatory open cover*

Where the open cover is facultative, meaning that one of the parties, usually the assured, has an option or discretion whether or not to appropriate a particular cargo or consignment to the open cover, unless the open cover provides to the contrary, the

³⁸ The court considered whether or not the breach was of an innominate term entitling the insurer to decline the claim, following the court’s earlier decision in *Alfred McAlpine plc v BAI (Run-off) Ltd* [2000] 1 Lloyd’s Rep 437, [26]–[35]. However, later in *Friends Provident Life & Pensions Ltd v Sirius International Insurance* [2005] EWCA Civ 601; [2005] 2 Lloyd’s Rep 517, the Court of Appeal disapproved of this earlier decision suggesting that no such innominate term existed as a matter of law.

³⁹ *The Beursgracht* [2001] EWCA Civ 2051; [2002] 1 Lloyd’s Rep 574, [34], [43] (Tuckey LJ): ‘This conclusion is of course not determinative, since if the contract expressly or impliedly provides that underwriters will not be bound unless and until they have received a declaration, then the intention of the parties to this effect will prevail’.

⁴⁰ [1916] 1 AC 281, at 287 (Lord Parmoor).

⁴¹ [1919] 2 KB 127, at 134 (Bailhache J).

declaration serves a critical contractual function in order to attach the cover to the declared cargo or consignment. In the absence of such a declaration, there will be no cover. A common form of such an open cover is the facultative/obligatory open cover. Under such an open cover, the assured will generally have the option to decide whether or not to declare, and therefore appropriate, the cargo to the open cover; upon the making of that declaration, by which the assured will identify and earmark the cargo for the purposes of the attachment of cover under the open cover, the insurer will, subject to the terms of the open cover, have no discretion to decline the declaration, and will be on risk as far as the declared cargo is concerned.⁴²

The making of the declaration operates to create a fresh insurance contract, because the open cover is an irrevocable standing offer and the declaration is the communication of the acceptance of that offer; upon the offer's acceptance, there is a resulting insurance contract.⁴³ In *The Beursgracht*,⁴⁴ Tuckey LJ said in respect of a facultative/obligatory open cover that '*The declaration . . . is an essential part of the contractual machinery since it informs the underwriter of what risks have attached to the cover and enables him to calculate as necessary and collect the premium due*'.

The precise identity of the contract of insurance is not always clear. In *Citadel Insurance Co v Atlantic Union Insurance Co SA*,⁴⁵ Kerr LJ said in connection with a hull reinsurance:

The open cover under which the defendants accepted liability as reinsurers was a standing offer whereby they agreed to accept liability for any declarations made to Austen in London within the terms of the cover. There was no other way in which such declarations could be made so as to become binding. The initialling of the original slip, which established the open cover, did not at that stage constitute any contract between the plaintiffs and the defendants. However, whenever any declaration was made thereunder on behalf of the plaintiffs to Austen in London, whether directly by CIMU or via International Excess, a contractually binding obligation was created between the plaintiffs and the defendants. This obligation arose in London on receipt by Austen of every such declaration. In this connection I am not saying that each declaration gave rise to a new contract of reinsurance for the purposes of – for instance – any relevant duty of disclosure, but merely that each gave rise to a new obligation of the defendants under the umbrella of the open cover. All liabilities of the defendants flowing from such declarations were liabilities which resulted from the receipt of such declarations by Austen in London. The plaintiffs are suing on the basis of many of these declarations. Accordingly, the contracts which gave rise to the alleged liabilities of the defendants were made in London . . .

⁴² *Robinson v Touray* (1811) 3 Camp 158, at 159–160 (Lord Ellenborough); *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674, at 682–683 (Blackburn J); (1872) LR 7 QB 517; *Inglis v Stock* (1885) 10 App Cas 263, at 268–269 (Lord Blackburn); *Davies v National Fire Co of New Zealand* [1891] AC 485, at 491–492 (Lord Hobhouse).

⁴³ *Citadel Insurance Co v Atlantic Union Insurance Co SA* [1982] 2 Lloyd's Rep 543, at 547–548 (Kerr LJ) (hull reinsurance); *The Tiburon* [1990] 2 Lloyd's Rep 418, at 422 (Steyn J) (hull); *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288, at 296–297 (Anthony Colman QC) (shipbuilding); *BP plc v GE Frankona Reinsurance Ltd* [2003] EWHC 344 (Comm); [2003] 1 Lloyd's Rep 537, [82]–[86] (Cresswell J) (construction).

⁴⁴ [2001] EWCA Civ 2051; [2002] 1 Lloyd's Rep 574, [34] (Tuckey LJ).

⁴⁵ [1982] 2 Lloyd's Rep 543, at 547–548 (Kerr LJ).

The oddity of this passage is that Kerr LJ is saying that the open cover (which was akin to a broker's open cover) does not represent a contract of reinsurance, or indeed a contract of any stripe, and that the acceptance of the declaration represents a '*contractually binding obligation*', but that each declaration does not give rise to a new contract of reinsurance. The contract of insurance (or in this case reinsurance) must have been created either when the open cover was agreed or when the declaration made in acceptance of the standing offer; Kerr LJ seems to eschew either possibility. The latter possibility appears to be the orthodoxy and seems to be right.⁴⁶ However, the open cover is also a contract, albeit not an insurance contract; it is rather a contract *for* insurance. As Lord Ellenborough said in *Robinson v Touray*,⁴⁷ '*The contract between the parties is complete, when the underwriters have signed the [open] policy.*' The open cover must have contractual force, because otherwise the standing offer which it represents could not be '*irrevocable*'.

Where the assured retains the option to choose whether or not to declare a particular risk, the assured is not under a duty of care in his or her selection of the risk.⁴⁸ Accordingly, the discretion available to an assured to select the risks to be declared under the open cover is an unfettered one. Where the assured, however, submits a declaration which falls outside the scope of the terms of the open cover, no contract of insurance results, unless the insurer accepts it notwithstanding.⁴⁹

14.4.3 *Timing of the declaration*

The open cover may well provide that any declaration must be provided or communicated to the insurer within a certain time period before or after shipment. Thus, in *Davies v National Fire Co of New Zealand*,⁵⁰ the facultative/obligatory open cover on goods required '*declarations to be made within forty-eight hours after departure of steamer from Sydney*'. In the absence of any specified time constraints, the parties to the open cover will probably be taken to have intended that the declaration should be made within a reasonable time after shipment. However, in the absence of words demonstrating urgency or making time of the essence, it is unlikely that any such time requirements will be construed so as to impose a condition precedent or warranty.⁵¹ This means that a declaration may be made late, even after the risk represented by the declaration has begun to run, and if it is made it will be effective to insure the subject matter declared. However, there is a limit to how late such a declaration may be made. As the insurance contract is necessarily a contract to insure against the risks of loss, a declaration which is

46 *Sedgwick Tomenson Inc v PT Reasuransi Umum Indonesia* [1990] 2 Lloyd's Rep 334, at 340 (Evans J) (hull); *Arnould: Law of Marine Insurance and Average* (18th edn, 2013), para. 9–15.

47 (1811) 3 Camp 158, at 159–160 (Lord Ellenborough).

48 *BP plc v GE Frankona Reinsurance Ltd* [2003] EWHC 344 (Comm); [2003] 1 Lloyd's Rep 537, [82]–[86] (Cresswell J); *Bonner v Cox Dedicated Corporate Member Ltd* [2005] EWCA Civ 1512; [2006] 2 Lloyd's Rep 152, [85]–[111] (Waller LJ) (reinsurance).

49 *The Tiburon* [1990] 2 Lloyd's Rep 418, at 422 (Steyn J).

50 [1891] AC 485, at 491–492 (Lord Hobhouse).

51 *The Beursgracht* [2001] EWCA Civ 2051; [2002] 1 Lloyd's Rep 574, [39], [43] (Tuckey LJ).

made after the loss (or possibly the insured peril causing the loss) has occurred is unlikely to be effective.⁵²

In some cases, the open cover will expressly allow declarations to be made after the risk incepts with retrospective effect. This often arises in respect of large-volume business or in respect of static storage risks, especially where goods are stored in common with other goods, where for example the declaration need be made only at the end of a calendar month or quarter, '*in arrears*'.⁵³ However, it is not always clear that the court will construe provisions which allow declarations to be made after the inception of the risk quite so simply. In *Davies v National Fire Co of New Zealand*,⁵⁴ the assured manufactured butterine in Melbourne, Australia and shipped the product to Sydney, sold some there, and after the butterine was '*reworked*', the majority was shipped from Sydney to London. The assured had the benefit of an open cover ('*open policy*') on goods which included cover while the butterine was in the Sydney factory. The open cover required '*declarations to be made within forty-eight hours after departure of steamer from Sydney*'. While there, there was a fire at the Sydney factory and the goods were lost. The assured claimed an indemnity in respect of the lost goods. At this stage, the assured had made no declaration in respect of those goods. In the words of Lord Hobhouse:

All the other shipments from Melbourne, about 560 kegs, were in the factory at the time of the fire and were capable of export to London. But they were also capable of sale in Sydney. No declaration about them had been made to the Defendants, no premium had been paid, no act had been done to earmark or identify any portion of them as goods to which the insured had elected to apply the policy; even now the plaintiffs cannot shew that they had done anything in their own business to appropriate any part of the destroyed goods to the London market.

The assured maintained that at the time of the loss no declaration was yet required under the open cover, because the declaration had to be made only within 48 hours after shipment from Sydney. In rejecting this argument, the Privy Council held that two declarations were required, one for the Melbourne to Sydney leg, and the other for the Sydney to London leg, and as no declaration had been made before the loss, there was no cover for the loss. Lord Hobhouse explained the position as follows:

The risk insured against is from Melbourne to London, via Sydney, by certain ships, and including detention and transshipment at Sydney. But, as we have seen, any part of the goods might be detained in Sydney. If then no declaration is to be made of the election of the insured to apply the policy to goods shipped at Melbourne, and if loss occurs on the voyage to Sydney or in Sydney itself, what security have the insurers that they may not be charged with the value of goods never intended for London at all? . . . The declaration expressed in the policy could not by any possibility be made if a loss happened between the shipment at Melbourne and that at Sydney, probably the most perilous part of the whole risk. It seems an absurd thing to stipulate only for such declarations as in half the cases of loss or more could not be made. On the other

⁵² *Glencore International AG v Alpina Insurance Co Ltd* [2003] EWHC 2792 (Comm); [2004] 1 Lloyd's Rep 111, [265] (Moore-Bick J) (cargo).

⁵³ *The Beursgracht* [2001] EWCA Civ 2051; [2002] 1 Lloyd's Rep 574, [19] (Tuckey LJ).

⁵⁴ [1891] AC 485, at 491–494 (Lord Hobhouse).

hand, in such a case as this, it is quite reasonable to require two declarations. One, far the most important one, would earmark the shipments at Melbourne to which the policy was to attach, and would be accompanied by payment of a premium. This is the ordinary declaration incident to the ordinary contract of an open policy, and necessary to make it operative. The other would enable the insurers to know how much of the goods was actually shipped for London, that they travelled by the stipulated class of ship, with the names of the ships and other particulars which, for the purpose of reinsurance or otherwise, would be valuable to them. Such a declaration would not be required by law as the ordinary incident of the contract, and would be the proper subject of an express stipulation. Such a stipulation their Lordships think is made, in very curt and imperfect terms it is true, but such as are not uncommon in mercantile contracts.

Accordingly, it seems that declarations are an important part of the attachment of cover under the non-fully obligatory open cover and must be made one way or another in respect of a risk to which the assured wishes the open cover to attach before the loss (or possibly before the occurrence of the insured peril causing the loss). In this way, the insurer will be protected by improper selections of consignments to the open cover which have already been lost.

Where, however, the open cover, on its true construction, allows retrospective declarations to be made, the making of the declaration may be made even after loss, by analogy with the principle reflected in section 6(1) of the MIA 1906, that property may be insured on a ‘lost or not lost’ basis, meaning that the insurance may be placed even after the loss has occurred, provided that the assured is not aware that the loss has occurred. Of course, if the assured enters into an insurance contract with knowledge that the subject matter has been lost and without having disclosed the same to the insurer, the insurer could probably avoid the contract of insurance on the grounds of an unfair presentation of the risk, without having to rely on section 6(1).⁵⁵ However, as discussed below, in the case of an open cover which is of a facultative/obligatory type, obliging the insurer to accept declarations made by the assured, the insurer is unlikely to be in a position to avoid the contract on this ground.

The effect of a late declaration under an open cover which allowed declarations to be made in arrears was considered by the Court in *Glencore International AG v Alpina Insurance Co Ltd*.⁵⁶ In that case, the open cover provided obligatory cover – in effect, it was a floating policy – in respect of transit risks for oil cargoes. For such cover, Moore-Bick J recognised that even if the assured failed to declare a shipment, it was nevertheless covered. However, the open cover also allowed the assured to take out storage cover under the open cover, ‘if required’. This was correctly interpreted to mean that the open cover in respect of storage risks was of the facultative/obligatory type. In this context, ‘the declaration performs a quite different function’. The usual position in respect of such facultative/obligatory open covers is that a declaration must be made in order to accept the standing offer and create the insurance contract. The judge then considered the effect of making a declaration, which was permitted to be made ‘in arrears’, after the occurrence of a loss and accepted that such a declaration is possible in order to provide

⁵⁵ Arnould: *Law of Marine Insurance and Average* (18th edn, 2013), para. 11–26.

⁵⁶ [2003] EWHC 2792 (Comm); [2004] 1 Lloyd’s Rep 111, [261]–[271] (Moore-Bick J) (cargo).

retrospective cover for the lost goods. The judge then dealt with the question of whether the declaration could be made not only after the loss occurred, but after the assured was aware that the loss occurred:

Once one accepts that a declaration to the cover could be made with retrospective effect it is difficult to deny the possibility that in some circumstances, at any rate, an effective declaration could be made even after a loss had occurred. For example, if Glencore declared goods for storage risks a month in arrears and they were damaged by fire the day before the bordereaux reached Alpina, it would not be possible for the cover to attach retrospectively from the time the goods entered storage but for the loss not to be covered. Either the risk had effectively attached or it had not. One solution would be to say that a retrospective declaration could not be made at all in respect of goods that had suffered loss or damage of any kind, but that would leave Alpina in the happy position of being able to charge premiums on a retrospective basis in respect of goods that had not suffered a loss while being in no danger of incurring liability in respect of any that had. In my view, therefore, Alpina's agreement to accept declarations of storage risks with retrospective effect necessarily entitled Glencore to make declarations after a loss had occurred, at least in those cases in which it was unaware of the loss at the time the declaration was made. However, that still leaves the question whether Glencore was entitled to make an effective declaration to the cover of goods in storage after a loss was known to have occurred . . . The element of risk is fundamental to a contract of insurance and for that reason it is essential where the cover is facultative/obligatory in nature that an unequivocal step of some kind attaching the risk to the cover has been taken before the insured knows of the loss. If, whatever may have been its original intention, Glencore remained free to change its mind at any time before making a formal declaration, it would have been able to declare a risk when a loss had been suffered and free not to declare it if there had been no loss . . . In these circumstances I am unable to accept that Glencore was entitled to declare to the cover with retrospective effect goods which it already knew had been subject to a loss.

Accordingly, except possibly in the most explicit of contracts, a declaration made under a non-fully obligatory open cover may not be made after the loss has occurred or, where the open cover permits the making of declarations in arrears, after the assured becomes aware of the loss. Of course, the open cover may well require immediate or prompt declarations as a condition for the attachment of cover, in which case in order to have the benefit of insurance cover, the declaration must be made in accordance with that condition.

14.4.4 Forms of declaration

The word '*declaration*' has been used to refer to the means by which under a facultative/obligatory open cover the assured earmarks the relevant cargo or other subject matter of insurance to the open cover. It is also referred to in section 29 of the MIA 1906 in respect of floating policies. In many cases, the declaration is a written communication to the insurer. However, the declaration need not take any particular form, although the open cover itself may specify the form of a valid declaration. Section 29(2) of the Marine Insurance Act 1906 provides that a declaration under a floating policy may take the form of an indorsement on the policy or may be effected by any customary means.

Open covers may also refer to the presentation of bordereaux to the insurer (or reinsurer). The principal difference between a declaration and a bordereau is that

a declaration is often limited to a single or individual subject matter, and a bordereau is a schedule or table setting out the details of a larger number of subject matters declared under the open cover. In both cases, the declaration and bordereau nevertheless fulfil the same function as each other, whether under a floating policy or under a non-fully obligatory open cover (although their functions under each of a floating policy and under a non-fully obligatory open cover are different, as discussed above).

Of course, as a declaration is not critical to the attachment of cover under a fully obligatory floating policy, unless the policy otherwise provides, the form of any declaration in such cases is an irrelevance for the purposes of attaching cover. It is possible for risks to attach to a facultative/obligatory open cover by means other than by communicating the assured's decision to the insurer. The assured still must make a decision in order to opt in to the insurance cover afforded by the open cover, and that decision must be made in a manner which is 'overt',⁵⁷ but it need not be communicated to the insurer, if the parties agree. The question is what would constitute such an 'overt' act. This is a matter for the parties to agree in their open cover. It may be that there is a book or register kept by the assured which records all of the risks which the assured has decided should be insured under the open cover.

In the reinsurance market, the 'overt' act is often the reassured's coding of the risk: this entails the reassured marking in writing on the inwards slip the reinsurance treaty to which the direct business is to be ceded, without necessarily informing the reinsurer of such coding. Such an arrangement has been held to be effective in the reinsurance market, not because of any provision to that effect in the reinsurance treaty, but by reason of a binding market custom or practice. Thus, in *Baker v Black Sea and Baltic General Insurance Co Ltd*,⁵⁸ the terms of a proportional facultative/obligatory reinsurance treaty which had been placed in 1957 referred to the 'basis of cession' and elsewhere provided for 'Quarterly Accounts. Provisional Bordereaux'. The court commented on the unchallenged evidence of market practice as follows:

The usual procedure was, and still is, that a Lloyd's underwriter identifies a specific reinsurance cession by use of a symbol incorporated within the underwriting reference written alongside his line on the stamp identifying the syndicate on the broker's slip . . . Once the LPSO has recorded the underwriter's reference, a system is then activated which provides for the payment of the premium due to the reinsurers and the collection of claims from reinsurers. It is customary for insurers to credit and debit reinsurers at agreed periods. In this case, as is common, the provision was for 'Quarterly Accounts'. These were in fact rendered. [The expert] was unable to explain the meaning of the additional requirement for 'provisional bordereaux', explaining that bordereaux . . . are themselves normally a quarterly list of premiums and claims provided by way of account. He did not regard that additional provision as constituting or demonstrating a requirement by [the reinsurer] for notification of the cession of identified insurances, explaining that such information was not usually supplied unless specifically provided for by agreement or requested from time to time.

⁵⁷ *Glencore International AG v Alpina Insurance Co Ltd* [2003] EWHC 2792 (Comm); [2004] 1 Lloyd's Rep 111, [270] (Moore-Bick J).

⁵⁸ [1995] Lloyd's Rep IR 261, at 273 (Potter J); aff'd [1996] LRLR 353, at 357 (Staughton J).

In *Limit No. 2 Limited v AXA Versicherung AG*,⁵⁹ Mr Jonathan Hirst QC, sitting as a deputy judge in the Commercial Court, adopted this reasoning in connection with the cession of risks by Lloyd's syndicates, who were the reassured, under a facultative/obligatory energy reinsurance treaty issued by Albingia as reinsurer:

The risks were ceded when the Syndicates coded the risk with a 'Y'. There was no provision in the treaties to de-cede a risk for late notification. Whilst it is unfortunate that the Syndicates failed to comply with the requirement for the provision of risk bordereaux, as they should have done (a general failure in the London market), that does not excuse Albingia from the risk to which it was already bound. It is right to add that, despite the absence of proper risk bordereaux, premiums were paid and accepted on the risks.

In the case of open covers relating to the direct insurance of cargo risks, there is no apparent market-wide practice, certainly none referred to in the authorities, which governs the making of declarations under the open cover. In those circumstances, one is left with the terms of the contract and, insofar as it is relevant, section 29 of the Marine Insurance Act 1906.

14.5 Utmost good faith and fair presentation of the risk

Under section 17 of the MIA 1906, the assured and the insurer bear reciprocal duties of the utmost good faith. This means that the assured and the insurer are obliged to disclose material information to each other prior to and at the time of the conclusion of the insurance contract. Any failure in this regard entitles the innocent party to avoid the insurance contract. Sections 18–20 of the MIA 1906 set out with some particularity the duty of full and accurate disclosure as it rests on the assured, which must be complied with '*before the contract is concluded*'. The 1906 Act does not explain in any detail the duty of disclosure as it rests on the insurer.⁶⁰

Sections 3–8 and 14 of the Insurance Act 2015 will essentially replace sections 17–20 as from 12 August 2016.⁶¹ Nevertheless, although there have been substantial changes to some aspects of the assured's duty of disclosure (especially as to the scope of what the assured is treated as knowing for the purposes of that duty) and to the remedies for breach of the duty, the 2015 Act imposes a broadly similar duty of full and accurate disclosure upon the assured now called the '*duty of fair presentation*',⁶² although the insurer's duty appears to have been practically, if not nominally, abrogated.⁶³ Under section 3(1), it is provided that '*Before a*

59 [2007] EWHC 2321 (Comm); [2008] Lloyd's Rep IR 330, [108]–[111] (Jonathan Hirst QC); rev'd in part [2008] EWCA Civ 1231; [2009] Lloyd's Rep IR 396.

60 As to the insurer's duty, see *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665; [1991] 2 AC 249; *Aldrich v Norwich Union Life Insurance Co Ltd* [2000] Lloyd's Rep IR 1.

61 In fact, section 17 of the 1906 Act is amended by section 14 of the 2015 Act and sections 18–20 of the 1906 Act are repealed by section 21(2) of the 2015 Act.

62 Section 3(2) of the 2015 Act.

63 It is abrogated in that although the duty of utmost good faith as laid down in section 17 of the 1906 Act remains by section 14(3) of the 2015 Act, the remedy of avoidance for breach of the duty is abolished by section 14(1) of the 2015 Act, and no remedy is prescribed for the breach of the insurer's duty of disclosure.

contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.'

It thus becomes clear, whether under the existing legislation or the Insurance Act 2015, that the date and time of the conclusion of the insurance contract are critical to the cessation of the assured's duty of fair presentation (the pre-contractual duty of full and accurate disclosure). Having regard to the discussion above, the making of the insurance contract pursuant to an open cover may occur and the concomitant duty of disclosure may arise in the following way:

- i) Where the assured and the insurer are both obliged to declare risks under the open cover, that is a floating policy, the insurance contract is concluded when the floating policy is agreed. In that event, the assured's obligation of disclosure exists and comes to an end at the time of the agreement of the floating policy, although the assured remains under a duty to act honestly in the presentation and correction of declarations under the floating policy.⁶⁴ This duty of honesty arises either expressly under section 29 of the Marine Insurance Act 1906 or pursuant to the duty of utmost good faith provided for under section 17.⁶⁵ The insurer is under an equivalent duty of disclosure up until the time of the conclusion of the floating policy, although it seems unlikely that there remains a viable duty of disclosure upon the insurer after the Insurance Act 2015 enters into force.
- ii) Where the open cover is a facultative/obligatory cover, and where the assured has a discretion whether or not to make a declaration and where the insurer is obliged to accept the declaration, the insurance contract is concluded on the assured's communication of the declaration to the insurer (or when some other '*overt*' act is performed).⁶⁶ In this event, the assured's duty of disclosure comes to an end when the open cover is agreed; the assured bears no duty of disclosure when the decision whether or not to make a declaration is made, because the insurer being obliged to accept the declaration is not in a position to exercise any underwriting judgment which would benefit from such disclosure.⁶⁷ Further, it may be said that as the contract of insurance is formed upon the insurer's receipt of the declaration, there is no further opportunity of disclosure thereafter. The

64 In *Berger & Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442, at 460, Kerr J suggested that section 29 modified section 18. It is suggested that this is an incorrect characterisation of the law. Whether or not section 29 had been passed, the duty of disclosure ceases on the agreement of the insurance contract.

65 *The Mercandian Continent* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563. See also *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209. However, there is a question whether there is in fact any post-contractual duty of utmost good faith at all: *The Aegeon* [2002] EWCA Civ 247; [2002] 2 Lloyd's Rep 42.

66 In *The La Pointe* [1986] 2 Lloyd's Rep 513, 520, 522 (Sup Ct British Columbia); aff'd [1991] 1 Lloyd's Rep 89 (Sup Ct Canada), Murray J held that the '*policy of insurance in the present case is the open cover*' (520), but later said that '*the insurance was placed by declaration under an open cover*' (522). It is not clear whether the open cover in that case was in fact a floating policy.

67 *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674, at 682–683 (Blackburn J); (1872) LR 7 QB 517. See also *The La Pointe* [1986] 2 Lloyd's Rep 513, 520, at 522 (Sup Ct British Columbia); aff'd [1991] 1 Lloyd's Rep 89 (Sup Ct Canada).

fact that disclosure is required from the assured at this preliminary stage, i.e. when the open cover is agreed, may limit the disclosure by reference to the materiality of the information in question. In *Glencore International AG v Alpina Insurance Co Ltd*,⁶⁸ Moore-Bick J said:

When a trader seeks insurance in the form of an open cover the underwriter is aware that most, if not all, of the risks that will be declared under it are unknown to the insured at the time the cover is placed and so cannot be the subject of any specific disclosure. Moreover, in the absence of any requirement in the policy to do so, the insured is not obliged to notify the insurer of matters affecting any particular risk which falls within the terms of the cover. It follows that the underwriter is content to assess the risk undertaken by giving cover in that form by reference to matters that affect the range of risks he is accepting, not by reference to matters that are relevant only to individual risks falling within the terms of the cover. As I have already pointed out, therefore, the insured's duty of disclosure does not normally extend to matters relating to individual risks, even if he knows of them (such as, for example, a cargo that is about to be carried on a particular voyage falling within the terms of the cover) because they are not material to the underwriter's assessment of the risk represented by the policy as a whole.

If, however, the declaration exceeds the scope of the cover, the insurance contract will be concluded on the insurer's acceptance of the declaration, and the assured will then owe the insurer a fresh duty of disclosure, because in those circumstances the insurer is not obliged to accept the declaration.⁶⁹ As the assured has a discretion whether or not to make a declaration under the open cover, it should follow that, under the MIA 1906, the insurer is under a duty to disclose material information to the assured up until the date of the making of the declaration. As discussed above, the insurer's duty may well be abrogated for all practical purposes upon the entry into force of the Insurance Act 2015.

- iii) Where, under the open cover, the assured is obliged to make a declaration and the insurer has a discretion whether or not to accept the declaration, the insurance contract is concluded on the insurer's communication to the assured of his or her acceptance of the declaration. In that event, the assured will continue to bear a duty of disclosure to the insurer at the time of the insurer's decision to accept the declaration.⁷⁰ There is no like duty owed by the insurer to the assured at the time of the acceptance of the declaration, although the insurer will owe a duty of disclosure at the time of the agreement of the open cover (although this will probably change when the Insurance Act 2015 comes into force).

⁶⁸ [2003] EWHC 2792 (Comm); [2004] 1 Lloyd's Rep 111, [33]–[42], [129] (Moore-Bick J).

⁶⁹ *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674, at 682–683 (Blackburn J); (1872) LR 7 QB 517; *The Dora* [1989] 1 Lloyd's Rep 69, at 74 (Phillips J).

⁷⁰ *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674, at 682–683 (Blackburn J); (1872) LR 7 QB 517; *Berger & Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442, at 460 (Kerr J).

- iv) Where both parties to the open cover have a discretion whether or not to make or accept the declaration, the insurance contract is made when the parties agree the terms of the declaration made under the open cover. The parties' respective duties of disclosure, and the assured's duty of fair presentation under the Insurance Act 2015, would come to an end when the declarations are made and accepted. There would be no similar obligation of disclosure at the time of the agreement of the open cover. However, there may be a right to rescind the open cover if it is a contract and there has been a misrepresentation.⁷¹

Under the regime governed by the Marine Insurance Act 1906, the duty of pre-contractual disclosure is not only governed by the date on which the contract of insurance is concluded, but also by the principle that if the rationale for the duty is no longer served by the duty, the duty itself ceases. Thus, in *The Star Sea*,⁷² Lord Hobhouse said that '*The section 17 principle is a principle of law and if its rationale no longer applies and if its operation, the conferment of a right of avoidance, ceases to make commercial or legal sense then it should be treated as having been exhausted . . .*' Essentially, the duty of disclosure is required when the insurer must exercise underwriting judgment.⁷³ This approach – although not expressly referred to – helps to explain how the duty of disclosure has been applied to each of the above circumstances when it comes to the conclusion of the relevant insurance contract made pursuant to or under an open cover. Under a facultative/obligatory open cover, for example, the insurance contract is concluded upon the making of the declaration, but the assured's duty of disclosure comes to an end beforehand when the open cover is agreed, because upon the agreement of the open cover, the insurer is obliged to accept declarations falling within the scope of cover and is not in a position to exercise underwriting judgment after the open cover is agreed. There is no reason why the approach should be different under the Insurance Act 2015.⁷⁴

14.6 Insurable interest and open covers

An open cover is a facility which allows a trader to make arrangements in advance for the insurance of cargoes during a future foreseeable period, usually a calendar year. It nevertheless remains a critical requirement of any valid indemnity insurance claim

71 *Société Anonyme d'Intermediaries Luxembourgeois v Farex Gie* [1995] 2 Lloyd's Rep 116, at 135–136 (Gatehouse J), at 148–149, at 151–152 (Hoffmann LJ), at 157–158 (Saville LJ) (retrocession); *Mander v Commercial Union Assurance Company plc* [1998] Lloyd's Rep IR 93, at 147 (Rix J); *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] 1 Lloyd's Rep 30, [48]–[53] (Aikens J).

72 [2001] UKHL 1; [2001] 2 WLR 170, [76] (Lord Hobhouse). See also *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672, at 683, 685 (Colman J) (guarantee).

73 In *The Elena G* [2001] 2 Lloyd's Rep 378, [25], David Steel J said '*The task of the assured is to disclose facts or circumstances material to the risk. It is the underwriter's task to appraise the risk against that fair presentation.*' See also *Glencore International AG v Alpina Insurance Co Ltd* [2003] EWHC 2792 (Comm); [2004] 1 Lloyd's Rep 111, [122] (Moore-Bick J).

74 There is no separate discussion of open covers in the Law Commission's report on Insurance Contract Law no. 353 (July 2014).

that at the time of the loss the assured has an insurable interest in the consignment declared under the open cover.⁷⁵ In *Dunlop Brothers & Co v Townend*,⁷⁶ Bailhache J referred to the requirement of an insurable interest in respect of floating policies, but the same is true in respect of non-fully obligatory open covers:

When a floating policy on goods is taken out the assured contemplates that goods will be coming forward in which he or the person on whose behalf he takes out the floating policy will, at any rate at the time of the loss, have an insurable interest. The floating policy might be taken out because of an insurable interest which the assured himself has in the goods or because of the insurable interest of other persons on whose behalf the floating policy is taken out. Insurable interests are of many kinds. The most obvious and most complete is the insurable interest of an owner in goods, but from that full and complete interest down to the smallest interest that can be covered by insurance there are many varying degrees of insurable interest. It is sufficient that the person on whose behalf the policy is taken out has some pecuniary interest which would be safeguarded by the safe arrival of the goods, and be injured by the failure of the goods covered by the floating policy, to arrive.

In the ordinary case, where transit risks are insured against under a cargo policy, the assured's insurable interest will have to be established in the cargo being transported. Difficulties might also arise in connection with any storage risk insured against under an open cover, because the purpose of a declaration under an open cover is to allocate the cargo to the insurance under the open cover. In *Ionides v Pacific Fire & Marine Insurance Co*,⁷⁷ Blackburn J said that '*The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy.*'

The difficulty does not arise, at least not obviously, in respect of specific goods, but it does arise in respect of unascertained goods (bulk cargoes or goods), which may be stored or carried with other goods of the same type and indeed may be commingled. For example, consider the position of a trader who has contracted to purchase 1,000 metric tons of grain and wishes to declare this under the open cover, or is obliged to declare it under the open cover, but the 1,000 metric tons lies in a storage facility, often with other goods of the same type. Indeed, the goods may be commingled. The assured's insurable interest may arise by reason of a proprietary or possessory title in the goods or if the contract of purchase allocates the risk of loss or damage to the assured or even if the assured has made an advance payment in respect of the goods.⁷⁸ However, that may not be enough. It may also be necessary for the unascertained goods to have been unconditionally

⁷⁵ Sections 5–6 of the MIA 1906.

⁷⁶ *Dunlop Brothers & Co v Townend* [1919] 2 KB 127, at 131–132 (Bailhache J). See also *Stephens v The Australasian Insurance Company* (1872) LR 8 CP 18, at 22–23 (Brett J).

⁷⁷ (1871) LR 6 QB 674, at 682 (Blackburn J); aff'd (1872) LR 7 QB 517.

⁷⁸ *Ebsworth v The Alliance Marine Insurance Company* (1873) LR 8 CP 596, at 611–612 (Bovill CJ); Clarke, *The Law of Insurance Contracts* (Informa), para. 4–5E2: '*He who has contracted to buy goods does not have an insurable interest in the goods unless he has them in his possession, or they are at his risk, or he has made an advance in respect of the purchase.*' See also Arnould: *Law of Marine Insurance and Average* (18th edn, 2013), para. 11–58; cf. para. 11–29; Rose, *Marine Insurance Law and Practice* (2nd edn, 2012), para. 3.27.

appropriated to the assured's contract of purchase.⁷⁹ Without such unconditional appropriation, it is impossible to say that the goods have been earmarked or identified for the purpose of attachment of cover to the goods in question. In the absence of such appropriation, there is nothing to which the open cover can attach.⁸⁰ For this purpose, it is not sufficient if the goods have been provisionally set aside for delivery to the assured; there must have been an intention to attach the goods in question to the purchase contract irrevocably. In *Carlos Federspiel & Co SA v Charles Twigg & Co SA*,⁸¹ Pearson J said that:

A mere setting apart or selection of the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use those goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods to the contract, the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer.

Accordingly, in order to appropriate the goods to the open cover, the assured's insurable interest in those goods must be identifiable, and those goods must be appropriated to the assured's contract of purchase.

Where the assured can establish a clear insurable interest in goods, but those goods are stored with other goods, and they are not segregated, the open cover should still be in a position to respond to any loss of the goods, provided that the bulk of which the assured's interest forms part itself can be identified. Thus, in *Glencore International AG v Alpina Insurance Co Ltd*,⁸² Moore-Bick J said, albeit in the context of disclosure, that:

As a general rule where goods belonging to different owners are commingled so that the original parcels cannot be identified the owners of those parcels become tenants in common of the bulk in proportions which reflect their respective contributions. Each time an owner draws from or adds to the stock the interests of the contributors are adjusted by law so as to reflect their contributions to the resulting bulk. If there is a loss, all those who were interested in the bulk at the time of the loss bear a rateable proportion of it and their interests in the remaining bulk are adjusted accordingly . . . If oil is put into commingled storage it will be possible to identify the bulk of which it then forms part. In the case of land storage that could be a single tank or a group of tanks, perhaps varying from time to time in size and number as demand for storage space varies. In the case of floating storage the bulk might be held in a single tank, a group of tanks on one vessel or a group of tanks on several vessels, again depending on the demand for space. What constitutes the bulk in any given case is essentially a question of fact.

Of course, in the case of commingled goods, if the bulk cannot be identified, there may be difficulties in appropriating the assured's goods to the open cover.

⁷⁹ Section 18, rule 5(1) of the Sale of Goods Act 1979.

⁸⁰ It may be that the insurable interest can be established by reference to an undivided share of an identified bulk, but in that event the bulk must be identified: see section 20A of the Sale of Goods Act 1979.

⁸¹ [1957] 1 Lloyd's Rep 240, at 248–249, 255 (Pearson J).

⁸² [2003] EWHC 2792 (Comm); [2004] 1 Lloyd's Rep 111, [134]–[135], [162] (Moore-Bick J).

14.7 Conclusion

Open covers and floating policies are frequently used for the insurance of cargoes in transit and in storage. The authorities considering such facilities are relatively few and, in some cases, show some confusion as to the nature of the facility involved. In analysing open covers, one must have a clear idea of the nature of the facility, how it is intended to operate commercially, the role of declarations under that open cover, and the identity of the relevant subject matter (goods). That analysis will then assist in determining the circumstances in which the insurance cover pursuant to the open cover will attach to the goods in question and the parties' obligations of disclosure. Open covers have been serving the international trading community for centuries and are here to stay. Even after such a long period of use, they would benefit from clear legal principles which determine important issues of insurance coverage.

CHAPTER 15

The ICC transit clause – developments and fault lines

*Sara Cockerill QC**

15.1 Introduction

In thinking about the Transit Clause in the Institute Cargo Clauses, I have been reminded of the famous dictum of Lawton LJ in *Maxwell v DTI*:¹

From time to time . . . lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise.

After all, at first blush what could be clearer and more obvious than a ‘warehouse to warehouse’ or ‘transit’ clause? Surely there is no difficulty in establishing what the clause is to cover? Well, one might think so, but just like defining fairness, it has proved a surprisingly slippery beast to pin down in words.

This point can be seen by a comparison of the very first warehouse-to-warehouse clause of 1912 with the clause as it appears today. Clearly a lot of work has been done over the years to try to capture the essence of what is, and is not, a transit.

Institute Cargo Clauses of 1912

Warehouse-to-warehouse Clause: Including (subject to the terms of the Policy) all risks covered by this Policy from shippers’ or manufacturers’ warehouse until on board the vessel, during transshipment if any, and from the vessel whilst on quays wharves or in sheds during the ordinary course of transit until safely deposited in consignees’ or other warehouse at destination named in the policy.

Institute Cargo Clauses 2009

Transit

8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit, continues during the ordinary course of transit and terminates either

8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse of place of storage at the destination named in the contract of insurance, or

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1 [1974] QB 523, at 539.

- 8.1.2 on the completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or
 - 8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit or
 - 8.1.4 on the expiry of 60 days after completion of discharge overside of the subject-matter insured from the overseas vessel at the final port of discharge, whichever shall first occur.
- 8.2 If, after discharge overside from the overseas vessel at the final port of discharge, but prior to termination of this insurance, the subject-matter insured is to be forwarded to a destination other than that to which it is insured, this insurance, whilst remaining subject to termination as provided in Clauses 8.1.1 to 8.1.4, shall not extend beyond the time the subject-matter insured is first moved for the purpose of the commencement of transit to such other destination.
- 8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.

Nor, of course, does clause 8 stand alone within the new clauses; it is supplemented by clause 9, governing termination at a place other than the named destination or before unloading, and by clause 10, covering change of voyage by the assured after attachment of the insurance.

It is, therefore, apparent that the clause has come a long way since its origins. Tracing all the changes which have appeared lies beyond the scope of this chapter, but we can see quite easily that sometimes changes have come because of stress-testing by cases in the courts. A very good example is the introduction in the 1960s of the 'place of storage' refinement. This arose principally² from the case of *John Martin of London, Limited v Russell*,³ though it seems likely that the earlier case of *Leo Rapp v McClure*⁴ helped to set the scene. In *Leo Rapp* a lorry loaded with metal was covered 'whilst in warehouse' and was lost from a yard enclosed by a high wall and a barbed wire fence. This, Devlin J held, was not a warehouse.

In the *John Martin* case, a consignment of lard was insured from Chicago to Liverpool until delivered to the consignees' or other final warehouse. The goods were unloaded into a transit shed in Liverpool to await collection and there became infested with copra beetle. Pearson J held in favour of the assured, holding that the cover had not terminated – on the basis that the transit shed might be called a warehouse but was not 'the final warehouse' contemplated by the clause. However, the ambiguity over whether a transit shed was a warehouse directly led the

² J. Dunt, *Marine Cargo Insurance* (Informa Law, 2009) at paragraph 11.19 (hereinafter referred to as Dunt).

³ [1960] 1 Lloyd's Rep 554.

⁴ [1955] 1 Lloyd's Rep 292.

drafters of the clauses to widen the phrase to include a 'place of storage'. This was, as explained below, a decision which has led to complications of its own.

Sometimes changes reflect problems which it is anticipated might arise, or developments in market practice; and always, of course, the quest is for the perfect clause, the perfect description of the transit (or the elephant).

The purpose of this discussion is to look closely at a few aspects of the new clause, to evaluate what the changes are and why they are there – and to try to assess how far the drafters have achieved their objective of the perfect clause.

The essence of the problem facing the drafters is one which derives from the complexities of modern commerce. Transit, in the sense of moving items from one place to another, certainly is easy to recognise when the nature of the transaction is that A carries a load of hay on their cart from B's farm to market. But the modern world is a far from simple place, and the clause must engage with and satisfactorily address a myriad of permutations – multiple forms of transport, containerisation, multi-storey warehousing, commodity stockpiling – the list is endless.

In broad terms for the drafters of the clause complications can arise in at least three places:

- (i) When does transit start and risk attach?
- (ii) When (before its safe completion) can the transit be regarded as no longer on foot, or, what is 'the ordinary course of transit'?
- (iii) When does transit cease and risk terminate?

Consequently, the new clause will be evaluated by reference to these stages.

15.2 Commencement of risk

The first question – commencement of risk – is not just the obvious place to start; it is also where one finds what might be called the headline change in the 2009 clause: the 'movement' innovation.

The 1982 version of the clause starts off like this:

This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates . . .

This formulation reflects a shift begun as early as the 1920s⁵ in relation to the fundamental question of where transit starts, away from the set up of the original clause – which was warehouse to warehouse, and which had clear scope within its wording for losses within the warehouse to be covered.

Relatively quickly, it seems, the question of where in the warehouse was the start point was considered to be too problematic. Thus subsequent versions, up to and including the 1982 clause, in broad terms focussed on the warehouse door as the trigger for inception of cover.⁶

⁵ Dunt, paragraphs 11.3–4.

⁶ K. S. Vishwanath, *Insuring Cargoes: A Practical Guide to Law and Practice* (Witherby, 2010), at pp. 229–231 (hereinafter referred to as Vishwanath).

But the results of this approach were felt to be not entirely satisfactory in terms of sitting with modern ways of doing business, and customers' expectations. There are two good examples in the US cases.

The first – which engages an issue which still requires consideration – is *Kessler Export Co v Reliance Insurance Co*.⁷ A cargo of sunglasses was being loaded on a lorry in the assured's premises on a Friday afternoon, and on completion of loading the trucker gave a receipt for them. But by this time it was too late for the lorry to leave. The sunglasses, therefore, remained over the weekend; on Monday morning, lorry, trailer and sunglasses were all gone. The court came to the conclusion that cover had not commenced, because the lorry had not left the warehouse; but despite the clear wording of the clause, the court found it a struggle given the commercial realities of the case.

The second case is *Brammer Corp v Holland America Insurance Co*.⁸ Here, loaded lorries had departed the manufacturer's control, and were in the warehouse's shipping area, but had not left the warehouse. The New York Supreme Court held that cover did not attach until there was movement out of the building.

In the face of the fairly clear wording, one can perhaps infer that the fact that these cases were fought at all reflected some sort of a mismatch in expectation. Moreover, as the learned editors of Arnould on Marine Insurance point out,⁹ the first movement of the goods may well be said to represent a more logical starting point for a policy of 'goods in transit' insurance than that of their leaving the warehouse, when their actual physical journey may already have started.

And this mismatch between the wording and market expectations was evident too in the lead-up to the drafting of the 2009 clauses. So it appears that in the London market some forms of extension looking back into the warehouse became commonplace – often at no extra cost,¹⁰ and Arnould notes that non-marine goods in transit policies sometimes contained express provisions defining 'transit' as including loading and unloading.¹¹

Other clauses used in the market, too, reflected this sense.¹² In 2004 the CEFOR clauses were redrafted to the following effect:

The insurer's liability shall attach from the time are moved for direct loading onto the means of transport which shall convey them from the warehouse or place where insured transport shall commence.

And the DTV Cargo Insurance Conditions 2000/2008 provide: '*The Policy . . . commences the moment the goods are removed – for immediate transport – from the place of storage*'.

⁷ [1962] AMC 2429.

⁸ [1962] AMC 1584.

⁹ Arnould: *Law of Marine Insurance and Average* (18th edn, Sweet & Maxwell, 2013), at paragraph 13–40 (hereinafter referred to as Arnould).

¹⁰ Arnould paragraph 13–40, J. Dunt & W. Melbourne, 'Insuring Cargoes in the New Millennium: The Institute Cargo Clauses 2009' published as Chapter 6 in D. R. Thomas (ed.), *Modern Law of Marine Insurance*, Vol. 3 (Informa, 2009) at paragraph 6.62.

¹¹ See e.g. *SCA Freight Ltd v Gibson* [1974] 2 Lloyd's Rep 533; *Tomlinson (Hauliers) Ltd v Hepburn* [1966] AC 451.

¹² Vishwanath, p. 291.

Against this background it is perhaps no surprise that in 2009 the ICC transit clause underwent a big shift back towards its origins, providing:¹³

8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit, continues during the ordinary course of transit and terminates either . . .

It is obviously tempting to regard the three sets of clauses, ICC, CEFOR and DTV, as being broadly equivalent, as they all step in the same direction. But this is unjustified by the wording. The solution proposed by the JCC in drafting the ICC clause is an obvious synthesis of the CEFOR and DTV solutions. It will, therefore, produce different results from either.

With such a significant change in wording, it is next door to inevitable that its boundaries will be tested in litigation. In terms of likely developments, a few points seem likely to emerge.

The first is the question of the ease of use of the ‘first movement’ test. Although the JCC, following CEFOR, consider that this trigger is no more complex than the warehouse door test, this seems to be open to doubt. CEFOR, arguing the point, draw a distinction between goods hit by a forklift which fails to lift the goods (not covered) and goods damaged in the course of lifting (covered).¹⁴ That situation may be clear. Others, it is suggested, may not be. What if the cargo is moved down to ground level and placed there prior to being picked up for loading by a forklift? Does cover commence on the warehouse floor or on the lifting down? Are goods covered as soon as they are moved with the intention of loading into a container?¹⁵

Another question is that of moral hazard. The question of first movement will be within the knowledge of the assured, or his warehouse-keeper. Does this give rise to moral hazard issues? The JCC felt not.¹⁶ But one may query whether that is right – where (for example) saying that an item was dropped by a forklift rather than being knocked by a forklift will affect whose cover is impacted.

Another point of concern is the extra layer of complexity added by the reference to immediate loading and the link to transit.

Dunt, one of the drafters of the clause, says¹⁷ that the intention is:

that the first movement of the goods, typically when the goods are taken from the shelf, should be immediately connected by a closely related chain of circumstances with the insured ‘transit’, meaning carriage by vehicles. If goods are taken from the

¹³ Emphasis added.

¹⁴ Vishwanath, p. 287. See also B. Soyer, ‘Cargo Insurance in the Multimodal Context: Full and Complete Cover?’ published as Chapter 16 in B. Soyer and A. Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law, 2014) at p. 289 (hereinafter referred to as Soyer).

¹⁵ Soyer argues powerfully (p. 289) that the answer to this question is no. Other examples which might lead to problems include when goods are positioned on the warehouse floor for packing or palletisation, fumigation or stuffing: Vishwanath, p. 288.

¹⁶ JCC Proposals p. 14; Dunt, paragraph 11.18.

¹⁷ Paragraph 11.22.

shelf to be placed in a waiting area, however secure that waiting area may be, then that movement is not for the purpose of 'immediate' loading for the commencement of transit. Accordingly, it is submitted that the goods will not be covered during that pre-transit movement nor for the time they are held in the pre-transit waiting area.

This may be safe enough; but there are much harder examples. One which he considers is a version of the *Kessler* example: goods loaded on a vehicle late on a Friday afternoon for despatch on a Monday morning. He considers that the word 'immediate' is intended to connect the movement of the goods from the shelf to the 'immediate' movement of the vehicle on which the goods are to be carried. He, therefore, concludes that the loading of the goods on a vehicle which is not to leave until some later time would not qualify the goods as having moved 'for the purpose of the immediate loading' within the terms of the revised clause 8.1.

It seems to me that whatever may have been the intentions of the JCC on this point, there is some considerable doubt whether this will be the result. The clause does not elide transport and loading in terms of immediacy. Loading must be immediate, but the transport need not be – it just needs to be the purpose of the loading.¹⁸ This suggests a purposive rather than a strictly temporal approach.

So, if you are loading up on a Friday for driving out the door as soon as the office opens on Monday, why should that not count? There is immediate loading for the purposes of transport. And as Dunt accepts, if he is right this may prove hard on the assured where the goods have to leave early on a Monday morning and must be loaded on a Friday.

Another interesting area is what happens in the case where there is an unexpected change. Here, it would seem, the result turns around from Dunt's Friday/Monday hypothesis – which again suggests that the hypothesis may not be sound. So assume goods have been moved and loaded aboard vehicles with the intention that they will leave immediately, but circumstances beyond the control of the assured, such as a traffic accident on a motorway, prevent the despatch of the vehicle. If this is considered delay beyond the control of the assured, the risk will have attached and will continue as long as it falls within the variations permitted by clauses 8.3, 9 and 10.¹⁹

Given how much turns on the 'immediacy' nexus, it is not impossible that some fire will turn on that requirement too. To date, 'immediate' has been held to mean the same as 'forthwith', namely with speedy and prompt action and as quickly as is reasonably possible. Difficult facts may push for a more generous interpretation of this requirement, or for a stretching of 'as quickly as reasonably possible'. Moreover, different fora may (without expert evidence) take different views.²⁰

Certainly there seems to be considerable scope for argument arising out of this more complex formulation for commencement of cover, particularly in cases like

¹⁸ See to similar effect Soyer, p. 289.

¹⁹ Again there are other examples of problems which may occur. For example, both Dunt and CEFOR indicate that containerisation is not per se part of the process – but that if there is a sufficient nexus between containerisation and the commencement of transit, cover may attach: Vishwanath, p. 289.

²⁰ Vishwanath, p. 291.

Kessler where there is a final loading for transport, but transport does not itself follow immediately. Certainly, too, any idea that a warehouse all-risks cover will become unnecessary in the light of the change to the wording can be dismissed.²¹ Assureds and their brokers would do well to think carefully about the circumstances under which a cargo is to be held and loaded before saving on the premium.

A parenthesis point – if one doubts that the tiniest issues will be stress-tested, one need only look at the refinement made to the ‘place of storage’ provision. This was introduced, as described above, to cover the question of whether a shed could be a warehouse. But a theory developed that the words ‘place of storage’ used in the 1982 Clauses were wide enough to include a ‘place’ of storage within a warehouse, such as a shelf; and it was widely debated in the market. For this reason, the revised wording now identifies the place where the risk attaches with the words ‘in the warehouse or . . . place of storage (at the place named in the contract of insurance)’.²²

15.3 The ‘ordinary course of transit’

The second key stage is that of ‘ordinary course of transit’. And nothing has changed here – the central mystery remains defined in the same terms as appeared in the 1912 clause and every version of the clause since.

However, the position remains less than clear. Arnould²³ points out that ‘Such authorities as exist afford little guidance on the meaning of “ordinary course of transit”. There are only a few decisions on the meaning of “transit” or “normal course of transit” in other forms of clauses; most of the English decisions concern lighterage contracts or relate to non-marine policies of goods in transit insurance.’

What we know may be summed up in the following propositions – which do shed some light on the facets which the courts recognise as characteristic to transit, and which may, therefore, impact on the issues which arise at either end of the transit.

The focus is on what is happening to the cargo: so in *Sadler Brothers Company v Meredith*,²⁴ a firm of ship’s cleaners insured their cleaning equipment while ‘in transit’. The cleaning equipment was put on one of their lorries. The police, considering the lorry to be an obstruction, ordered the lorry to be moved and parked 70 yards from their premises. The cleaners then went back to their office to collect their job sheets and have a cup of tea, and in their absence the cleaning equipment was stolen. Insurers argued that ‘parking in what would otherwise be in the course of transit would take the goods off risk’. Roskill J said:²⁵

. . . when one is dealing with the transit of goods, . . . what one is considering is the goods themselves being in course of transit and not the question of the means of

21 Vishwanath, p. 292. S. Marsden, ‘The Institute Cargo Clauses (A) Recontextualised’ (2013) *European Insurance Law Review* 33 at p. 41 (hereinafter referred as Marsden).

22 Dunt, paragraph 11.19.

23 Paragraph 13–41.

24 [1963] 2 Lloyd’s Rep 293.

25 Ibid., at 307.

conveyance in which that transit is taking place, be it ship transit, railway transit, bullock, or whatever it may be; it is being in motion. And I think that there one wants to bear in mind that transit has in its nature the element of carriage about it and the carriage starts not when the movement of the vehicle in which the carriage is taking place starts, but when the goods are placed on the vehicle. . . . I think here 'transit' means the passage or carriage of goods from one place to another, and I think the goods were still being carried, and therefore were still in transit from the one place to the other even though the lorry in which they were being carried was temporarily parked.

While temporary stops may well be covered, storage as such will not. A good example here is *Roma Furniture Company v Fireman's Fund*:²⁶ furniture was imported from Italy, stored at Port Newark for 22 days, picked up by a haulier and stored for another 13 days before it was stolen. The court held there was no cover as these were not temporary stops.²⁷

Normal stops will be covered, as will delays outside the assured's control which quite often occur:²⁸ thus in *SCA (Freight) Limited v Gibson*²⁹ there was a 'normal course of transit' clause. The assured hauliers sent two lorries to collect a consignment of books in Rome. After the lorries were partially loaded, the staff decided to take them for a drive into the centre of Rome, during the course of which they overturned the lorry and damaged the books. There was no doubt that transit had begun, but were the goods in the ordinary course of transit? The answer was negative:

Goods cease to be in transit when they are on a journey which is not in reasonable furtherance of their carriage to their ultimate destination. Obviously a detour which is reasonably necessary to enable a driver to obtain food or rest would be in furtherance of the safe and expeditious carriage of the goods to their ultimate destination. It would be an ordinary incident in the transit of goods by the plaintiff's vehicles. It is a question of degree, as to what is or is not in reasonable furtherance of the carriage of the goods. A deviation which is wholly unrelated to the usual and ordinary method of pursuing the adventure would prevent the goods being 'in transit' within the meaning of the policy.³⁰

One may perhaps note a recent echo of this 'ordinary incidents in' approach in the rather different context of an 'in transit loss' clause in a charterparty. In *The Valle de Cordoba*³¹ Andrew Smith J held that the stealing of a major portion of the cargo by pirates did not fall within the clause because what was contemplated as covered by the clause was loss incidental to the carriage of the cargo, and did not extend to losses such as those that occurred because of the action of the pirates.

26 [1987] ADC of NJ. Vishwanath, pp. 235–238.

27 See also *Dealers Dairy Products v Royal Insurance* [1960] 170, Ohio 336, 10 Ohio 2d 424, 164 NE 2d 745: the plaintiff's machinery was en route on a lorry. They contacted the lorry driver and told him to unload the machinery, leave it where it was and load up a cargo of ice cream to deliver to a customer. The machinery was stolen. The court concluded (unsurprisingly) that there was no cover – the stop was unrelated to the carriage and amounted to an abandonment of the carriage.

28 Or as the editors of Arnould put it: 'delays outside the assured's control which regularly but do not always occur in a normal voyage' – at paragraph 13–41.

29 [1974] 2 Lloyd's Rep 533.

30 Ibid., Ackner J at 535.

31 [2014] EWHC 129 (Comm); [2014] 1 Lloyd's Rep 550.

And this approach is further reinforced by the deliberate inclusions to cover in clause 8.3. We get some sense of what would be outside the ordinary course of transit by looking at this clause which lists delay beyond assured's control, deviation,³² forced discharge, reshipment or transshipment as being covered. There must at least be doubts as to whether these items would be covered as falling within 'the ordinary course of transit' absent this.³³

There is no simple answer as to what is or is not in reasonable furtherance of the adventure:³⁴ a deliberate decision by the assured to leave the goods in store may or may not qualify. Where the decision is taken to obtain some commercial advantage, this would usually fall outside the ordinary course.³⁵ In *Safadi v Western Assurance*³⁶ policies insured cotton and yarn from Manchester to Damascus. The goods were destroyed by fire in a customs house in Beirut, where they had been for more than 30 days after discharge from the overseas vessel. It was argued by the assured that cover still continued as a result of delay beyond their control resulting from a rebellion in Syria. But the court found that disturbances had abated. The real reason the goods were left in the warehouse at Beirut was that the receivers did not want to pay for them and wished to take advantage of the credit that was available by keeping them in the warehouse. Similarly, in *Verna Trading Pty Ltd v New India Assurance Co Ltd*³⁷ the assured deliberately, and for its own commercial convenience, left its cargo in storage in the stevedores' bond area at Melbourne for over a month following discharge. One reason why the claim failed was that the storage was not in the 'ordinary course of transit'; it was only the deliberate decision to store the cargo there as a matter of convenience which took the goods out of the ordinary course of transit. However, a more sympathetic view is seen in *Westminster Fire Office v Reliance Marine Insurance Co*,³⁸ where the goods were held still to be in transit at a time when they were waiting on the quay while the assured was trying to find a purchaser for them.³⁹

The best cross-check is the concept of 'collateral purpose':⁴⁰ this was introduced in *Fedsure General Insurance Ltd v Carefree Investments Pty Ltd*,⁴¹ where a containerised consignment of imported fabric was left stored in a port warehouse in Durban prior to customs clearance and forwarding on to the assured's warehouse in the city. The reason? Commercial convenience, as the owner did not then have to pay duty and tax. The court⁴² held that:

32 Soyer, pp. 291–292, asks, interestingly, whether this provision might have saved the SCA Hauliers. Is a joyride a 'deviation'? I would suspect a court would be resistant to this approach, even if it did not insist on the full technical definition in the MIA 1906.

33 Soyer, p. 290, views the interrelationship of the clauses similarly.

34 Arnould, paragraph 13–41.

35 The editors of Arnould rightly note that the burden of proof is on the assured: paragraph 13–41.

36 (1933) 46 Ll L Rep 140.

37 [1991] IVR 129.

38 (1913) 30 TLR 137.

39 Dunt (paragraph 11–44) regards the result as surprising and one suspects that the assured's evidence of the efforts it was making was impressive.

40 Dunt, paragraphs 11.36–11.37.

41 (477/99) [2001] ZASCA 88 (11 September 2001: South Africa: Supreme Court of Appeal).

42 Howie JA at [12].

. . . a delay or interruption which, objectively viewed, is not part of the usual and ordinary means of effecting transit, and which is occasioned by some collateral purpose, will disturb the ordinary course of transit. Accordingly, loss occurring within the period of such delay or interruption will not be covered by the policy . . . The reason is not that the insurance has come to an end (for it remains in existence), nor that the transit has come to an end (for the journey is not yet finally over) but simply that the insurance pertains to the ordinary course of transit and what is outside the ambit of that course cannot, logically, be within the cover.

This approach has been applied in the UK in *Eurodale Manufacturing Ltd v Ecclesiastical Insurance Office plc*,⁴³ where mobile phones had been delivered to a warehouse late on a Friday for their onward transportation after Bank Holiday Monday and it was held that their storage could not properly be said to be for ‘some collateral object or purpose’ but was part of the continuing transit between supplier and customers.

Delay within the assured’s control will be an indicator of collateral purpose: this can be seen from the cases above, and is reinforced by clause 18 of the Clauses – the Avoidance of Delay clause. This provides that ‘it is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control’. It has been held (in the *Verna Trading* case) that this addresses circumstances within the assured’s control.⁴⁴

15.4 Completion of transit

The third phase where problems occur is, of course, completion of transit. Here, in a sense, one gets a reflection of the opening dilemma. The question of where transit stops or starts is a fundamental question, and yet it is by no means sure that it must be – or is in this clause – answered the same way at both ends of the transit.

Clauses 8.1.1 to 8.1.4 essentially try to capture some of the better-known circumstances which may result in termination of cover and some of the puzzles that arise about stops and delay. In broad terms, the circumstances covered are: (i) the completion of transit by unloading at the final destination (8.1.1), (ii) unloading for storage/allocation or distribution outside the ordinary course of transit (8.1.2), (iii) use of the carrying vehicle or other container for storage (8.1.3) and (iv) effluxion of time – 60 days after discharge from a vessel (8.1.4).

The changes made to these clauses have obvious parallels to the drafting of clause 8.1. So, the trigger in clause 8.1.1 (delivery at the final destination) is changed from delivery at the warehouse to completion of unloading in or at the warehouse. As with the change in commencement of transit, this derives (according to the JCC Proposals) from the reality of cover being written in the market. But

43 [2003] EWCA Civ 203; [2003] Lloyd’s Rep IR 444.

44 [1991] IVR 129, at 145–146. See also *Wiggins Teape Australia Pty Ltd v Baltica Ins Co Ltd* [1970] 2 NSW 77 where it was held by Macfarlane J that ‘the policy extends only during transit prosecuted with reasonable despatch’ and that coverage was ‘provided that . . . the assured acted with reasonable despatch in all circumstances within its control’ (at 80).

it also avowedly is designed to create a symmetry with the state of play as regards loading.

Similarly the other major change, the reference to ‘completion of unloading’ might seem like a mirror for first movement, and seems designed to achieve this as well as to reflect the position set out in *Tomlinson Hauliers v Hepburn*.⁴⁵ Dunt gives a forklift example designed to offer a mirror image of CEFOR’s loading example:⁴⁶

So if a forklift taking the goods from the carrying vehicle, and the goods are then carried into a warehouse, the ‘completion’ of unloading in such a case only takes place when the goods are placed on the ground within the warehouse by the forklift. The insurance covers accidents which occur during the forklift journey between the carrying vehicle and the goods being placed on the ground within the warehouse or other place of rest.

However, he doubts that the parallel is perfect, by reference to the hypothetical situation where the goods, after they have been placed on the ground, are then moved again (e.g. to a shelf). That second movement, he says, is not covered, while he considers there would have been cover from the shelf on loading.

This provides an interesting arguable point. Would the movement from the shelf to floor before loading have counted? Again we may be looking at a question of degree – if there was a significant temporal gap, surely the de-shelving would not count as a ‘first movement’ for ‘immediate loading’.

But certainly Dunt is right to this extent: that the absence of a last movement linked to unloading at the termination end may well lead to situations where closely similar factual scenarios at different ends of the transit may produce different results on the covered/not covered scale.

Nor are these the only questions. There is probably cover for de-stuffing a container on a lorry in a warehouse⁴⁷ and for unloading a lorry in a warehouse, and for unloading a lorry at the door of the warehouse. But is there cover for removing a container from a lorry and then destuffing it?⁴⁸

Elsewhere in the ‘termination’ of cover section, not much else has changed. There has been no amendment to suggest that the drafters were unhappy with the relationship between clauses 8.1.1 and 8.2, which the Court of Appeal posited in *Bayview Motors Ltd v Mitsui Fire & Marine Ins Co Ltd*.⁴⁹ In that case, a consignment of Toyota vehicles was insured for a voyage to Santo Domingo in the Dominican Republic (from whence they were to be forwarded to the Turks and

⁴⁵ Where Lord Reid rejected a disjunction between completion of transit and unloading and Lord Pearce found unloading stopped at ground level: ‘The cigarettes started their journey when they left the ground to be loaded on to the van. They would have completed it when they reached the ground again on being unloaded. As they were still on the van when the loss occurred, they were still on risk.’

⁴⁶ Paragraph 11.42.

⁴⁷ De-stuffing containers is an area likely to raise problems. Soyer, p. 296, points out that de-stuffing containers following their discharge from the carrying vehicle might well be regarded differently to de-stuffing directly from the container on the lorry.

⁴⁸ Vishwanath, p. 292.

⁴⁹ [2002] EWHC 21 (Comm); [2002] 1 Lloyd’s Rep 652, per Steel J; affirmed [2002] EWCA Civ 1605; [2003] 1 Lloyd’s Rep 131 (CA).

Caicos islands) on terms including clause 8.1.1 in the 1982 Clauses. The vehicles were discharged into a fenced-off parking lot within the port which was in essence a bonded store run by customs who controlled access and in due course stole the cars. The Court of Appeal held that the transit shed was not a final place of storage, not least because the vehicles were due to be shipped onwards. That being the case, the position was covered by clause 8.2; clause 8.1.1 only operated when the final destination of the goods was the destination named in the policy. Tuckey LJ's opinion, which highlights the commercial realities, is worth quoting:⁵⁰

Where the final destination of the goods is the destination named in the policy, clause [8.1.1] will operate according to its terms. Cover ceases when the consignee takes delivery or the goods reach their final resting place (warehouse or place of storage) at the destination. But where goods are intended to go to the destination named in the policy and then on to some other destination I do not think that the clause contemplates that there will be a final warehouse or place of storage at the destination named in the policy. In such a case the warehouse or place of storage is not final and cover will only cease if the assured elects to use it either for storage other than in the course of transit or for allocation or distribution (clause [8.1.2], . . .). . . . This construction makes good commercial sense. In a case like the present the consignee will insure the transhipment. That insurance is likely to attach when the goods leave the warehouse or place of storage at the place named in the policy for the commencement of the transit (see the opening words of clause 8.1). It would be commercially inconvenient for the consignee to have to arrange separate cover for the period before transhipment and after discharge to the warehouse or storage area in the destination port. It makes sense for the insurers of cargo in its transit to that port to continue cover for a limited time (up to 60 days) until the next stage of the transit starts.

There are two other points worth noting in the termination section. The first is the introduction of clause 8.1.3 which terminates cover when the assured or their employees elect to use the carrying vehicle, other conveyance or container for storage other than in the course of transit. This is a change caused by the extension of cover to unloading. The intention⁵¹ was to ensure that the new extension of cover to 'unloading' was not used by assureds as a method of prolonging cover by leaving goods loaded aboard vehicles in circumstances that exposed them to enhanced risk.

More likely to be the subject of debate is the change which adds into the mix the acts of employees. Previously, the wording of the clause suggested that election had to be by the assured itself. Now it is made clear that an employee may make the election for storage or allocation or distribution under clauses 8.1.2 and 8.1.3. The intention on the part of the JCC here was to introduce some species of trade off for the longer cover now provided.⁵² However, a number of questions arise.

The first, and most obvious, is: who is an employee for these purposes? No definition is provided by the Clauses. One should probably assume that the test will echo the vicarious liability test, and this hypothesis is lent some strength by the exclusion of independent contractors from the ambit of the clauses.

⁵⁰ Ibid., [12]–[13].

⁵¹ See the JCC Proposals, p. 14.

⁵² JCC Proposals, p. 14.

The second is what effect this change will have. Generally, it seems to be assumed by commentators that this marks a substantive change and will give rise both to the sorts of difficulties one sees in the vicarious liability context and a need for increased oversight by head offices.⁵³ However, is this really the case? While some of the previous cases on election did concern single-operator businesses, others did not, and while the details of the election are not easy to discern, it seems unlikely that, for example, Wiggins Teape's election⁵⁴ in *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd*, was made by the directing mind and will of the company. One may therefore doubt whether this apparent extra resource for insurers will actually give them much new protection, as against the extension of cover to unloading.

The timing of the election under clause 8.1.3 is a point which should also be noted. Under clause 8.1.2, cover terminates on completion of unloading. But the nature of the problem in 8.1.3 makes the same approach in this clause impossible; the concern being addressed is precisely that the goods would not be unloaded but left on the vehicles, or other conveyances, or in a container. Logically, therefore, the trigger point has to be the election itself and not the use of vehicles or containers for storage. In many cases no problem will arise; the two events will be simultaneous or at least very closely linked in time. But what if the plan is decided upon in advance? Logically, a situation could arise where cover terminates under this clause before the goods are half way to the destination. While this possibility hovers, and anyone grappling with this situation ahead of time should be alive to it, it is probable that Dunt is right in suggesting that in practice a court is likely to try to look to the manifestation of the election, most usually by the use of vehicles or containers for storage as the trigger for termination.

One final potential problem,⁵⁵ which links both ends of the transit clause, is worth positing, just for fun: what happens if, following a loading which satisfies the requirements of clause 8.1, an assured elects to use a vehicle or conveyance for storage, outside the ordinary course of transit, at the beginning of the insured journey? This might, for example, happen if there is some reason for delaying transit which crops up at the last moment – a tsunami, a fuel shortage or a port blockage. It would seem, on a straight reading of the clause, that cover will commence, but will then terminate.⁵⁶ If that is the case, the assured had better be alert to ensuring cover is back in place when the goods are eventually moved. Another possibility is that on the same facts one might conclude that there is no election at all and that the assured can simply characterise the events as delay beyond its control – in which case the ordinary course of transit is not interrupted, and cover continues. Which approach a court would take to this dilemma seems likely to be fact-dependent with the assured's degree of control, calculation and self-interest

⁵³ Marsden, p. 41.

⁵⁴ To leave cargoes of wood pulp in a port warehouse as a matter of regular practice owing to the paucity of storage at the plaintiff's mill. Wiggins Teape is one of the leading international producers of paper products.

⁵⁵ Raised both by Dunt, paragraph 11.59, and Marsden, p. 40.

⁵⁶ Contrast the example given earlier when an intended departure is delayed.

very much in focus, as it has tended to be in the authorities on ordinary course of transit.

15.5 Conclusions

Following this review of the new clause, what conclusions can we reach?

The first is that life, certainly with the complexities of modern commerce, makes it very difficult for even the most diligent drafter to capture the concept of transit securely and beyond question. If that was the aim of the drafters of the 2009 Clauses, they have not succeeded; and we may doubt that any drafters could have succeeded. We can, therefore, be confident that it remains the case that at each stage of the evolution of a transit, there will still be scope for ingenious lawyers to pick fault lines in these carefully drafted clauses.

The second is that the clause, although now intimidatingly long, represents a welcome move back towards the original approach to warehouse-to-warehouse cover, and towards the commercial expectations of modern clients. While hard cases will emerge, there will be likely to be fewer which confound the people whose business provides the *raison d'être* for the clause. Cases will continue to turn on small factual distinctions, but those distinctions will push courts more consistently towards a recognisable concept of a transit than was the case under the 1982 and earlier iterations of the clause.

Insuring cargoes in the new era – impact of the Insurance Act 2015 on standard cargo clauses/wordings

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16.1 Introduction

The Insurance Act 2015,¹ which received Royal Assent on 12 February 2015,² introduces significant changes to English commercial and marine insurance law by amending the provisions of the Marine Insurance Act (MIA) 1906 concerning the duty of utmost good faith and warranties and other risk control clauses.³ The purpose of this article is to deliberate the potential impact of this piece of law reform on warranties and other risk-control clauses in cargo insurance, especially standard cargo clauses.⁴ A good starting point for an analysis of this nature will be to identify the main changes introduced by the Insurance Act 2015 in this field:

- i) Section 10 abolishes any rule of law to the effect that a breach of a warranty in a contract of insurance results in the discharge of the insurer's liability.⁵ Instead, in case of breach of a warranty, the liability of the insurer will be suspended but the risk will reattach, in most instances, once the breach is remedied. By virtue of s. 10(2), however, if loss arising after remedying the breach is attributable to something happening during the period of suspension, the insurer has no liability. This subsection recognises the fact that the risk in some cases might acquire new characteristics as a

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1 The Act is one of the main outcomes of the reform initiative led by the English and Scottish Law Commission (Law Commissions) which commenced in 2006 with a scoping paper. In the course of nine years, a series of Issues and Consultation Papers have been published by the Law Commissions. The final report of the Law Commissions on the subject was published in 2014: *Insurance Contract Law: Business Disclosure; Warranties; Insurer's Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/131. The project has also led to the enactment of the Consumer Insurance (Disclosure and Representations) Act (CIDRA) 2012 which came into force on 6 April 2013 (SI 405/2013).

2 The Act will enter into force on 12 August 2016.

3 The 2015 Act also provides new rules replacing those available at common law in respect of the effect on the insurer's liability of an assured making a fraudulent claim under a policy (see ss. 12–13). Furthermore, it introduces highly technical changes to the Third Parties (Rights against Insurers) Act 2010 aimed at removing drafting errors that had so far prevented that Act being brought into force (ss. 19–20).

4 The potential impact of the reform on various aspects of duty of utmost good faith will not be deliberated here. The 2015 Act introduces significant changes in this field by changing the main parameters, and these changes will have impact on pre-contractual good faith duties of the assured; but these are extra-contractual issues which will not form part of the discussion in this article.

5 This is the remedy stipulated in s. 33(3) of the MIA 1906.

result of the breach, and, therefore, the breach might have an everlasting impact on the insurer's original risk assessment.

- ii) Section 11 stipulates that if compliance with a term of a contract of insurance would tend to reduce the risk of i) loss of a particular kind, ii) loss at a particular location or iii) loss at a particular time, a breach of that term will not suspend liability if the assured shows that non-compliance with the term could not have increased the risk of the loss that actually occurred in the circumstances in which it occurred. The objective of this provision is to prevent insurers from denying a claim that arises during a period when the insured is in breach of warranty, if compliance with the warranty would not have had any impact on the loss occurring. This provision gives additional protection to the assured in cases where the warranty breached was not designed to deal with the risk which caused a particular loss. It applies not only to warranties as traditionally understood but also to other risk control clauses such as condition precedents to liability, suspensory provisions and exclusion clauses.
- iii) Nevertheless, s. 11 is subject to a major exception: it does not apply to a warranty or term that serves the purpose of describing the limits of cover as a whole. This is because such a term will have a general limiting effect and is not linked to a specified risk. Therefore, if a policy stipulates that the insured cargo will be carried in a watertight container and loss arises at a time when it is not carried in such a container, s. 11 will provide no relief to the assured, who will be deprived of indemnity for the loss emerging.
- iv) For commercial and marine policies, the relevant provisions of the Insurance Act 2015 can be excluded subject to important transparency safeguards as set out in s. 17.⁶

This brief introduction sets the scene for a detailed analysis of potential impact of the changes introduced by the Insurance Act on cargo policies which will follow.

16.2 The potential impact of sections 10 and 11 of the Insurance Act 2015 on common warranties in cargo policies

Although standard cargo clauses do not contain any express warranties,⁷ it is the invariable practice to incorporate several of them into cargo policies, depending on the nature of the cargo and risk insured against. Given the drastic nature of the changes introduced by the Insurance Act 2015, one might assume that the legislative reform will lead to significant changes in this practice. This is true to a

⁶ Conversely, for consumer policies, the rules mentioned above will be mandatory in the sense that a contract term which would put the assured in a worse position than under the Act will not be permitted at all (s. 15 of the Insurance Act 2015).

⁷ As discussed below, it has been suggested by Australian authorities that cl. 18 of the Institute Cargo Clauses (ICC) (both 1982 and 2009 versions), which deals with delay in the performance of the voyage, can be viewed as a warranty, but this is far from settled as far as English law is concerned.

certain extent, but it is submitted that as far as some types of warranties are concerned, there will be no drastic change in the legal position.

16.2.1 Cargo warranties – instances where no significant change is expected

Alteration of the remedy in case of breach of a marine warranty will in most cases work in favour of the assured, in that they will be able to bring themselves back within the policy coverage as long as the breach is remedied. However, there will be frequent instances where the nature of the warranty is such that it will not be possible to remedy the breach during the currency of the policy. For instance, if a warranty affirms that the insured cargo is ‘current season’s crop’ but this does not hold true, breach will result in the insurer never coming on risk, as compliance with this kind of warranty is likely to be treated as a condition precedent⁸ to the attachment of the risk.⁹ Here, the warranty in question is one that relates to a period before the attachment of the risk. In other words, the risk attaches only if the warranty is satisfied. The function that a warranty of this type serves is to assist an underwriter in rating the scope of the proposed insured risk, and the underwriter agrees to undertake the risk by relying on the contractual undertaking that forms the basis of such a warranty. In case of breach, therefore, it is understandable why they will not come on risk at all, and the Insurance Act 2015 is not expected to alter the common law position with regard to such warranties.

Similarly, no substantial deviation from the current legal position will arise if a warranty is breached and there is no realistic prospect of remedying the breach at a later stage. For example, if a warranty that requires the insured cargo to be stuffed into the container by the manufacturer is not complied with, the cover, assuming that it starts when the goods are moved in the warehouse for the purpose of immediate loading,¹⁰ will be suspended from that point onwards and it will not be practically possible to remedy this breach at a later stage.¹¹

16.2.2 Cargo warranties where a different outcome could be expected

The position is likely to be different when dealing with future warranties that relate to a period after the attachment of the risk. Imagine that a cargo policy contains the following term: ‘Warranted printing machinery to be carried from port of discharge to final warehouse in a low bed multi-axle trailer’. If the forwarder arranges an ordinary lorry to carry the machinery from the port of discharge and the insured cargo is lost following an accident caused by the driver suffering a heart attack at

⁸ See comments made by Lord Mansfield in *De Hahn v Hartley* (1786) 1 TR 346, at 345–346.

⁹ A similar legal outcome will also follow if the following term, which is regularly incorporated into cargo policies, is not complied with: ‘Warranted surveyor to approve vessel(s), tug(s), barge(s), towing arrangements, all other carrying conveyances and all lifting equipment including cranes required for loading/unloading operation prior to attachment.’

¹⁰ See cl. 8 of the ICC 2009. Compare, however, cl. 8 of the ICC 1982.

¹¹ In a similar vein, if a warranty requires insured cargo to be transported in ‘new bags’, a warranty which is often used when insuring cargoes such as coffee, the cover will be suspended from the moment when the goods are put into old bags, with no prospect of remedying such breach at a later stage.

the wheel, under the traditional warranty regime the assured will not be able to recover, as the insurer will be discharged from liability automatically after the breach regardless of whether the breach is material to the loss or there is any causal link between the loss and the breach.¹² However, the position might well be different under s. 11 of the 2015 Act. The assured in such an instance could contend that compliance with the warranty in question would tend to reduce the risk of loss of a particular kind (e.g. risk of loss caused by the hazard that the insured property is unwieldy or top-heavy) and non-compliance with the warranty could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. Put differently, the assured could argue that during the period of breach of this particular warranty, the insurer's liability in respect of hazards created by carrying an oversized cargo without using an appropriate truck is suspended. However, for losses associated with other hazards (e.g. the driver suffering from a heart attack and losing the control of the truck), the insurer's liability remains intact under s. 11. The burden of proof is on the shoulders of the assured.¹³ This section has been introduced to prevent insurers from relying on breaches of irrelevant warranties – that is, where the type of loss which occurred is not one which compliance with the warranty could have any chance of preventing.¹⁴

A similar outcome could follow in a case where a warranty requires the IMDG Code for Dangerous Goods to be complied with at the time of loading. If this requirement is not complied with but the cargo is lost when the vessel sinks following (say) a collision, it is possible that s. 11 could provide a lifeline to the assured, who might be entitled to indemnity by showing that non-compliance with a warranty could not have increased the risk of loss which actually occurred in the circumstances in which it occurred.

16.2.3 *Cargo warranties – position unclear*

Section 11 is relevant in the context of a warranty (or term) that aims to reduce the impact of a particular risk-increasing event or circumstance. On the other hand, as mentioned above, it is not applicable when loss arises following breach of a warranty (or term) that serves the purpose of describing the limits of the cover as a whole. The reason is that such a term will have a general limiting effect not linked to a specific risk.¹⁵

A clause commonly used in cargo insurance is the Institute Classification Clause, which requires the cargo to be carried only on board vessels classed with an approved

¹² Section 33(3) of the MIA 1906.

¹³ Section 11(3) of the Insurance Act 2015.

¹⁴ However, it is likely that s. 11 will create uncertainties, as identifying whether compliance with a warranty could have increased the risk of the loss which occurred in the circumstances in which it occurred might not be a straightforward task. In the example above, the insurer could potentially argue that the warranty has been introduced to reduce the risk of loss caused by traffic-related incidents. It is a genuine concern that the test introduced has the potential to increase transaction and litigation costs by leaving enough room to parties to argue in opposite fashion.

¹⁵ *Insurance Contract Law: Business Disclosure; Warranties; Insurer's Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/131, at paras. 18–35.

classification society and within the age limits specified.¹⁶ If the insured cargo is carried on a vessel that does not qualify, the cover is suspended. The Classification Clause is a term that aims to describe the limits of the cover as a whole; that is, cover is only available when the insured cargo is carried on board a vessel that is in compliance with the Clause. This means that s. 11 will have no application, so if a loss follows breach of the Classification Clause, no cover will be available even if the non-compliance in no way increased the risk of the loss which actually occurred in the circumstances in which it occurred. A similar outcome should follow in a case where, for example, a warranty requires the carrying vessel to be ISM Code-compliant. If cargo is lost when carried on board of a non-compliant vessel, no cover will be available and s. 11 of the 2015 Act will be of no avail for the assured, given that such a warranty is designed to describe the risk in a general manner.

So far so good; but in some cases, difficulty is likely to arise in identifying whether the term in question is one that aims to describe the risk in a general way or whether it aims to minimise a particular risk-increasing event/circumstance.¹⁷ One example that immediately springs to mind is s. 41 of the Marine Insurance Act 1906, which implies a warranty of legality in marine policies. This section imposes two types of obligations on the part of the assured. The marine adventure must not only be legal at the inception of the policy,¹⁸ but it must be also performed legally, so far as the assured can control the matter.¹⁹ Assume that the assured obtains insurance for a cargo of medicines for a legal voyage from the UK to Jamaica, but their agents use fraudulent documents to load the cargo on the carrying vessel in contravention of a statute that prohibits export of such cargoes without the permission of the Department of Health. Assume too that the cargo is lost as a result of the carrying ship sinking following a collision. It is evident that s. 41 is breached; but it is also indisputable that the breach could not have increased the risk of loss which actually occurred (as a result of perils of the seas) in the circumstances in which it occurred. Would the implied warranty of legality be treated as a provision designed to describe the risk as a whole, or as one intended merely to minimise the effect of a particular risk – namely, possible seizure or bureaucratic hold-ups? Naturally, the insurer and assured are likely to have different views as to the nature of the legality warranty, with the insurer arguing for the former interpretation and the insured for the latter.²⁰

16 Under the present law, this effectively operates as a warranty and there is no cover if the vessel carrying the cargo does not qualify, whether or not this is causative of any loss. See the decision of the Singapore Court of Appeal in *Everbright Commercial Enterprises Pte Ltd v AXA Insurance Singapore Pte Ltd (The Sirena 1)* [2001] 2 SLR 316 and the Hong Kong High Court in *Nam Kwong Medicines & Health Products Co Ltd v China Insurance Co Ltd and the People's Insurance Co Ltd (The Pacifica)* [2002] 2 Lloyd's Rep 591.

17 For a more comprehensive discussion on this point, see B. Soyer 'Risk Control Clauses in Insurance Law: Law Reform and the Future' (2016) 75 Cambridge Law Journal 1, at pp. 121–122.

18 A marine adventure can be rendered illegal by various means – by statute, common law, prize law, orders made by the Queen and other international rules.

19 In *Ingham v Agnew* (1812) 15 East 517, although the adventure insured was lawful at its outset, it was not performed legally, as the assured sailed without a convoy, in violation of a statute which prohibited sailing without a convoy.

20 This will, undoubtedly, necessitate an enquiry as to the reasons for the implementation of the relevant statute.

If the assured's contention finds judicial support, in the scenario above the loss would be recoverable despite the fact that the voyage has not been executed in a legal fashion by virtue of s. 11 of the Insurance Act 2015. It is submitted, however, that the function of the warranty of legality is to assist risk assessment, and this term in all probability relates to the contract (and risk) in a more general fashion. Therefore, in case of its breach the risk assessment undertaken by the insurer at the outset is in tatters, and for that reason s. 11 should have no role to play in this context. A contrary solution would also reduce the role that this warranty is expected to play, affording an assured a potential defence in cases where the insured's adventure is performed in an illegal fashion under their control. This could be said to be inconsistent with public policy. That said, due to the fact that no attempt has been made to describe these key concepts in the Insurance Act 2015, disputes of this nature are likely to arise.²¹

16.3 The potential impact of sections 10 and 11 of the Insurance Act 2015 on implied voyage conditions

In the absence of a contrary provision in the policy, it is trite law that a policyholder after attachment of the risk is entitled to alter the nature of the risk without the consent of the insurer.²² In voyage policies, in order to protect the insurer against this eventuality, implied terms (also known as voyage conditions) have been introduced into contracts by virtue of ss. 42–48 of the Marine Insurance Act 1906. Historically these provisions have played a significant role in determining the scope of the cover, although their significance has declined in contemporary practice, especially in the context of cargo insurance, as a result of held-covered clauses and other clauses that have been employed to ameliorate harsh consequences of breach of these provisions.

Some of these so-called voyage conditions operate in the same way as continuing warranties (especially s. 45 (change of voyage),²³ s. 46 (deviation)²⁴ and s. 48 (delay

21 Similar debates could arise in the context of the implied warranty of 'seaworthiness', but this warranty is invariably waived in standard cargo clauses; see for example cl. 5.1 of the ICC 2009.

22 Pollock CB in *Baxendale v Harvey* (1849) 4 H & N 445, at 449, 452, famously said: 'If a person who insures his life goes up in a balloon, that does not vitiate his policy. . . . A person who insures may light as many candles as he please[s] in his house, although each additional candle increases the danger of setting the house on fire.'

23 By virtue of this provision, a change of voyage occurs if after the commencement of the risk the destination of the ship is voluntarily changed from the destination contemplated by the policy.

24 Section 46 of the MIA 1906 stipulates:

- (1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.
- (2) There is a deviation from the voyage contemplated by the policy –
 - (a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or
 - (b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.
- (3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

in voyage)²⁵), in the sense that breach of any of these conditions entitles the insurer to discharge themselves from liability prospectively under the contract without prejudice to liability for previous losses, although they are not technically speaking classified as warranties.²⁶ Similarly, some of these conditions have the same effect as a breach of a warranty that needs to be complied with before the attachment of the risk – especially s. 43 (alteration of port of departure)²⁷ and s. 44 (sailing for different destination),²⁸ and hence any breach prevents the risk from attaching.²⁹

During the process of consultation, the implied voyage conditions stipulated in ss. 42–49 received little attention. Some of those consulted suggested that their impact on contemporary practice is so limited that abolishing them would not create any difficulty.³⁰ Others, such as the Law Reform Committee of the Bar Council and Royal and Sun Alliance, argued for their retention.³¹ In the end, the Law Commissions took the view that no specific arrangement with regard to the implied voyage conditions was needed in the new legislation, and the relevant provisions of the 1906 Act have been left untouched.³² Furthermore, the Commissions concluded that the changes in this area to be implemented through ss. 10 and 11 of the 2015 Act would not have any impact on voyage conditions, as they were expressed as conditions precedent to attachment of the risk, rather than warranties.³³

It is clearly correct to suggest that ss. 43 and 44 (and possibly s. 42(1)) of the 1906 Act, which need to be satisfied in order for the risk to attach, are unlikely to be affected by the Insurance Act 2015. Since ss. 43 and 44 are conditions precedent to the attachment of the risk, it follows that if the implied obligations they create are not satisfied, no risk ever attaches, so there can be no issue of a loss within the scope of the policy in the first place. Despite the fact that the matter is complicated due to the introduction of the remedy of avoidance, a similar observation is in order with regard to s. 42(1). If, after the formation of the policy, the commencement of

25 Section 48 of the MIA 1906 stipulates that the insurer is ‘discharged from liability as from the time when the delay became unreasonable’.

26 As they are not ‘promissory’ in nature.

27 This section stipulates that: ‘Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.’

28 Section 44 of the MIA 1906 reads: ‘Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.’

29 The consequence of s. 42, which deals with delay in commencing the insured adventure, is a curious one, as it enables the insurer to avoid the policy.

30 See in particular the submission made by the City of London Society.

31 For a summary of submissions made, visit: http://www.lawcom.gov.uk/wp-content/uploads/2015/06/duty-of-disclosure_responses_warranties.pdf (last visited on 1 January 2016).

32 Conversely, the Australian Law Reform Commission, when considering a possible reform of the Marine Insurance Act 1909 (Cth) (ALRC Report 91), proposed that the provisions of the MIA 1909 relating to change of voyage, deviation and delay should be repealed, permitting these concepts to be dealt with as express terms of the contract. This Report was not acted upon and can be found at: <http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc91.pdf> (last visited on 1 January 2016).

33 Paragraph 16.24 of *Insurance Contract Law: the Business Insured’s Duty of Disclosure and the Law of Warranties* (2012) LCCP 204/SLCDP 155.

the adventure insured is delayed unreasonably, the insurer could opt to avoid the policy; and if this option is exercised there can be no liability under it.

However, it is submitted that the position might be different with regard to other voyage conditions, notably change of voyage (s. 45), deviation (s. 46) and delay in the course of the voyage (s. 48). These provisions are certainly not ‘conditions precedent to attachment of the risk’. On the contrary: they closely resemble continuing warranties, given that in case of their breach the remedy stipulated in the relevant provisions of the 1906 Act is prospective discharge from liability. The reach of s. 11 of the 2015 Act is broad, in that it applies not only to marine warranties but to any other term, whether express or implied, other than a term defining the risk as a whole. There is, therefore, ample scope to argue that it does affect implied voyage conditions that no deviation should take place during the execution of the insured voyage, or that the insured voyage should not be delayed unreasonably, or that the destination of the ship should not be voluntarily changed from the destination contemplated by the policy after the commencement of the voyage. That is because it can be plausibly argued that compliance with s. 46 would tend to reduce the risk of loss at a particular time (i.e. during the period of deviation). Similarly, compliance with s. 45 aims to minimise the risk of loss of a particular kind (caused by diverting the vessel to a different location than that agreed in the contract), while compliance with s. 48 aims to reduce the risk of loss of a particular kind (caused by delay).

Assuming that ss. 45, 46 and 48 of the MIA 1906 can be viewed as provisions that are designed to minimise the risk of loss of a particular kind, at a particular location and/or at a particular time, this opens the door for s. 11 of the Insurance Act 2015 to be relevant in a case where loss arises following breach of these provisions. If so, the crucial question will be to identify whether this could create unforeseen consequences for parties using standard cargo clauses as the basis of their agreement. This issue will be analysed next.

Let us start with s. 46, which stipulates that the insurer is discharged from liability as from the time of deviation. In a voyage hull policy, s. 11 might potentially be a game changer. For example, if there is a deviation within the meaning of s. 46, and a loss arises immediately afterwards due to a reason that is not connected with the deviation (e.g. a fire in the engine room due to a latent defect), then, assuming that s. 11 is relevant, the assured can argue that the deviation could not have increased the risk of loss which actually occurred in the circumstances in which it occurred (loss as a result of a latent defect in the machinery). This could potentially provide them with a useful new lifeline. However, this will not be a plausible eventuality under a cargo policy using standard Institute Clauses as the basis of cover. By virtue of cl. 8.3 of ICC 2009 (A, B and C),³⁴ the insurance policy shall remain in force, *inter alia*,³⁵ in case of ‘any deviation’. The clause is

³⁴ Clause 8.3 of the ICC 1982 stipulates in the same manner.

³⁵ For example, if there is delay beyond the control of the assured, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.

not dependent on any action on the part of the assured and cover is, therefore, extended automatically in case of deviation, negating the effect of s. 46. The reason why such an extension is granted automatically is that in contemporary shipping practice, cargo interests would normally have no control over the course of the voyage, or in most instances knowledge of the identity of the vessel on board of which the assured's goods will be loaded, once they are collected from their factory or warehouse. It is, therefore, safe to say that in case of deviation in a cargo policy, the cover would remain in place, as the application of s. 46 of the MIA 1906 in such a policy has been negated by cl. 8(3) of the ICC 1982 or 2009.

A similar outcome is likely to arise when a change of voyage takes place in a cargo policy. That is because cl. 10(1) of the ICC 2009 (A, B and C) stipulates that in a case when the destination is changed after the attachment of the policy, in breach of s. 45 of the MIA 1906, cover will nevertheless be extended as long as the assured gives prompt notice to the insurer and additional premium and terms are agreed.³⁶ This provision is essentially a held-covered clause, and it is clear that cover will be extended as long as it is available 'at a reasonable commercial market rate on reasonable market terms'.³⁷ Section 11 of the Insurance Act could, however, be relevant in a case where it is not possible to extend the cover under cl. 10(1). There is authority to the effect that the additional risk contemplated by a held-covered clause must be one that is capable of being placed in the market at a reasonable commercial rate.³⁸ If not, a held-covered clause could not be operated. The reason for this is that the undertaking given by the insurer under a held-covered clause is subject to an implied condition that the additional risk is one that has a market value.³⁹ Therefore, if notice is not given promptly or the change of voyage is so extreme (e.g. changing the destination to a port located in an area which is a hotspot for pirates) that no cover would be available in the market at a reasonable rate or on reasonable terms, cl. 10(1) would have no effect, and in that case potentially s.45 of the 1906 Act and s. 11 of the Insurance Act 2015 could be relevant. In this example, if the cargo is lost after the destination is changed as a result of fire on board, attributable to negligence of the crew, by

36 Clause 10 of the 1982 version of the clauses is drafted in a similar manner.

37 It is evident that cl. 10(1) will come into play even if the cargo suffers a loss before notice is given – as long as, of course, the assured could demonstrate that they were not aware of the change in destination prior to the loss, and they gave notice as soon as they became aware of it. Hamilton J, in *Mentz Decker & Co v Maritime Insurance Co* [1910] 1 KB 132, at 134, stipulated: '... I do not think the words "due notice" can be read as meaning that no notice is to be considered as "due" unless it is given at a time when the underwriter can still protect himself by reinsurance. I think the clause must be read as an agreement to hold the assured covered subject to a proviso which is satisfied by the giving of such notice as the assured could give after advice of deviation, and that, there being nothing predictable to be done on the receipt of the notice under the circumstances of the present case, the notice was given sufficiently early at the time when it was in fact given.' See also *Greenock Steamship Co Ltd v Maritime Insurance Co Ltd* [1903] 1 KB 367, at 376, per Bigham J.

38 *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560, at 568, per Donaldson J. This was followed in phantom ship cases in Singapore and Hong Kong: *Everbright Commercial Enterprise Pte Ltd v AXA Insurance Singapore Pte Ltd (The Sirena 1)* [2001] 2 SLR 316 and *Nam Kwong Medicines & Health Products Ltd v China Insurance Co Ltd (The Pacifica)* [2002] 2 Lloyd's Rep 597.

39 Clause 10(1) of the new version of ICC 2009, dealing with change of voyage, makes this expressly a part of the held-covered clause.

utilising s. 11 of the 2015 Act, the assured could potentially contemplate that change of voyage could not have increased the risk of loss which that actually occurred in the circumstances in which it occurred (i.e. negligence of the crew).

The position is more complicated in cases where an unreasonable delay arises which amounts to breach of s. 48 of the MIA 1906. This is because cl. 18 of the ICC 2009 seems to introduce a similar requirement to s. 48. The clause carries the title of ‘avoidance of delay’, and is worded: ‘It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.’ It is not clear whether this clause requires anything more arduous from the assured than s. 48 of the MIA 1906 does. Put differently, is the assured simply expected to proceed expeditiously with the voyage to the extent that matters are in their control, or does the clause impose a more general requirement on the assured to act without delay during the currency of the policy?⁴⁰ It might be possible that the clause has been introduced to replicate the statutory provision just in case the 1906 Act does not apply to periods of land transit under a policy affording warehouse-to-warehouse cover,⁴¹ although this is unnecessary given the fact that by virtue of s. 2, a policy extended by its express terms ‘so as to protect the assured against losses on inland waters or any land risk which may be incidental to any sea voyage’ is a marine policy coming under the scope of the Act. If, on the other hand, the purpose of cl. 18 is to replicate s. 48, it is rather curious that the drafter felt the need for a contractual solution given that s. 48 was well-equipped to deal with the issue. In addition, the legal standing of this contractual provision (i.e. whether it is a warranty or innominate term) is uncertain. The use of the words ‘condition of this insurance’ in cl. 18 could be taken as an indication that the consequences for breach are likely to be termination of cover,⁴² and it is not beyond the bounds of possibility that the term will be construed to be a marine warranty on the basis that it is a promissory undertaking on the part of the assured.⁴³ Two Australian cases on the matter seem to suggest that cl. 18 is a

40 The matter has been deliberated in J. Dunt, *Marine Cargo Insurance* (2nd edn, Informa Law, 2016), at [11.40], who seems to be of the view that the clause requires the assured to pursue the voyage or land transit without unreasonable delay.

41 This was the view of the majority in *Verna Trading Pty v New India Assurance Co Ltd* [1991] VR 129 SC (Vict, Aus).

42 The term ‘condition’ is used in a wide range of senses in common law. However, in the context of insurance law, where the provision that contains the word ‘condition’ is used to describe the obligations of one of the parties, usually the assured, in a precise manner, courts often have treated such clauses as ‘condition precedent to liability’ of the assured; see *Pilkington United Kingdom Ltd v CGU Insurance plc* [2004] EWCA Civ 23, [2004] Lloyd’s Rep IR 891 and *Shinedean Ltd v Alldown Demolition (London) Ltd (in liquidation) and Axa Insurance UK plc* [2005] EWHC 2319 (TCC). In those instances, the obligation is one which ‘goes to the root of the contract’, as underlined by Mackinnon LJ in *Welch v Royal Exchange Assurance* [1939] 1 KB 294, at 312.

43 Rix LJ, in *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co and Others* [2001] EWCA Civ 735; [2001] 2 Lloyd’s Rep, at [101] proposed that a term in an insurance contract is a warranty if (a) it goes to the root of the contract; (b) if it is descriptive of risk or bears materially on the risk of loss; and (c) if damages would be an inadequate or unsatisfactory remedy for the breach. The obligation expressed in cl. 18 compares favourably to the characteristic properties of marine warranties identified by Rix LJ. This was also the view of J. Dunt in the first edition of his book, *Marine Cargo Insurance*, although in the second edition, influenced by the current editors of *Arnould*, at [11.39] he seems to suggest that it is most unlikely that this clause will be construed as a ‘promissory warranty’.

warranty. In *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd*,⁴⁴ it was held that the ‘condition’ imposed by the clause effectively operated as if it were a promissory warranty because the ‘policy extends only during transit prosecuted with reasonable despatch’. Similarly, in *Verna Trading*,⁴⁵ it was held that there was no cover when the assured failed to act with reasonable despatch.

Regardless of the precise nature of the relationship between cl. 18 and s. 48 of the MIA 1906 in cargo policies, it is submitted that any delay in prosecution of the voyage within the control of the assured will have a detrimental effect on the cover for losses that arise as a result of such delay. This is because cover under cl. 8.1 of ICC 2009 continues only ‘during the ordinary course of transit’. There is little or no direct English authority on the meaning of the phrase ‘ordinary course of transit’. In a case involving construction of a carrier’s goods in transit policy, *SAC (Freight) Ltd v Gibson*,⁴⁶ Ackner J said:

Goods cease to be in transit when they are on a journey which is not in reasonable furtherance of their carriage to their ultimate destination. Obviously a detour which is reasonably necessary to enable a driver to obtain food or rest would be in furtherance of the safe and expeditious carriage of the goods to their ultimate destination. It would be an ordinary incident in the transit of goods by the plaintiff’s vehicles . . . A deviation which is wholly unrelated to the usual and ordinary method of pursuing the adventure would prevent the goods being ‘in transit’ within the meaning of the policy.⁴⁷

This test provides a good starting point as it acknowledges the fact that it is not essential that the goods be in motion at all times. Any transit can be interrupted (and will possibly be interrupted in practice); but an interruption takes the goods outside the ‘ordinary course of transit’ only if it cannot be justified on the basis that it was essential for reasonable furtherance of their carriage to their ultimate destination.⁴⁸ On that basis, it is a plausible standpoint to argue that any delay of the voyage that is within the control of the assured takes the goods outside the ‘ordinary course of transit’, and if any loss which is associated with the delay arises, there will be no cover. It is unlikely that ss. 10 and 11 of the Insurance Act 2015 will alter the position, given that cl. 8.1 is a provision which describes the risk in a general manner and if it is not complied with no cover will be available.

But what if the delay comes to an end and the contemplated voyage restarts? In that case, would the assured be able to recover for a loss arising after the resumption? Assuming that cl. 18 can be viewed as a promissory warranty, under the traditional warranty regime the insurer would be discharged from liability from

⁴⁴ [1970] 2 NSW 77, at 81.

⁴⁵ [1991] 1 VR 129.

⁴⁶ [1974] 2 Lloyd’s Rep 533.

⁴⁷ [1974] 2 Lloyd’s Rep 533, at 535.

⁴⁸ In a South African case, *Fedsure General Insurance Ltd v Carefree Investments Pty Ltd* [2001] 2 ZASCA 88; [2002] 1 All SA 379 (A) (Sup Ct CA South Africa), a containerised consignment of fabric imported from Korea was stolen from the warehouse at the port of Durban. Upon arrival of the goods to Durban, the assured decided to leave the goods in the port warehouse for some time as he had some cash flow problems and was not in a position to pay tax duty. It was held that the goods were not in the ordinary course of transit at the time of the loss.

the date of delay without any prospect of the risk reattaching. However, under s. 10 of the Insurance Act 2015 the new legal remedy in that case is suspension of the cover during the period of delay. Therefore, once the ordinary course of transit is resumed, cover will be reinstated and any loss emerging thereafter should be recoverable. The introduction of the new remedy of ‘suspension of cover’ would, therefore, work in favour of the assured in those instances.

One should, however, not lose sight of the fact that none of this is certain. An insurer could quite credibly deploy an opposite argument, to the effect that the purpose of ss. 45, 46 and 48 of the Marine Insurance Act 1906 is to define the limits of cover as a whole, and that they do not aim to reduce the effect of risk-increasing events or circumstances. There is no guideline in the Insurance Act 2015 as to how to distinguish between these two types of term; and if this standpoint describes the correct position of law, in case of its breach of these provisions, s. 11 will have no role to play.⁴⁹ This is a plausible argument, but the burden will be on the insurer to show that ss. 45, 46 and 48 of the 1906 Act indeed have this effect. All of these potential difficulties could have been avoided, had the drafter taken the opportunity to clarify the position of the voyage conditions in the context of the Insurance Act 2015. The Law Commissions’ basic presumption that the 2015 Act would not apply to implied voyage conditions is clearly misguided, and the wording of s. 11 invites assureds to develop arguments to the effect that this section might be relevant in cases where the loss arises after a voyage condition is breached but before the breach is remedied.

16.4 Contracting out

The 2015 Act allows parties to a commercial insurance contract to contract out of most provisions of the Act, including ss. 10 and 11,⁵⁰ as long as they manage to overcome the ‘transparency requirements’ stipulated in s. 17: that is, (a) if the insurer takes sufficient steps to draw a disadvantageous term to the attention of the assured before the contract is entered into,⁵¹ and (b) if such term is clear and unambiguous as to its effect.⁵² The first hurdle is likely to be satisfied in many instances in the context of cargo insurance, given that it is very common that the wording of such policies is prepared by a broker, so that the broker’s knowledge of such a disadvantageous term would be adequate to satisfy this requirement.⁵³ The second hurdle will be satisfied if the term contracting out of the Act is drafted in a clear manner expressly stipulating its effect. Again, invariably all insurers

49 *Insurance Contract Law: Business Disclosure; Warranties; Insurer’s Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/131, at [18]–[35].

50 It is not permitted to use basis of contract clauses even in non-consumer insurance policies (s. 16(1) of the Insurance Act 2015).

51 Section 17(2) of the Insurance Act 2015.

52 Section 17(3) of the Insurance Act 2015.

53 Section 17 (5) of the Insurance Act 2015 stipulates (emphasis added): ‘The insured may not rely on any failure on the part of the insurer to meet the requirements of subsection (2) if the insured (or its agent) had actual knowledge of the disadvantageous term when the contract was entered into or the variation agreed.’

operating in the cargo market are sophisticated enough to be able to draft this clause to satisfy the requirements of s. 17.

The interesting question at this stage is to what extent cargo insurers in the London market will be tempted to contract out of the new law and insist on doing business under the unamended Marine Insurance Act. This is a difficult question to answer, and at the time of writing there was no clear indication from the market as to how matters will progress. However, it is conceivable that the premium level may be kept at the current levels only if the assureds are willing to contract out of the protections given by the Insurance Act 2015. There is no doubt that the changes introduced will alter basic parameters of risk assessment, but perhaps more fundamentally there will be a degree of uncertainty as to how the courts will handle some difficult provisions of the 2015 Act, such as s. 11, and it is possible that underwriters may prefer to manage the transition period by contracting out.

16.5 Conclusions

Like other types of insurance contracts, cargo policies are also expected to be affected by the introduction of a new remedy by s. 10 of the Insurance Act 2015, although probably the impact of the change will not be as dramatic as it would be for other types of insurance contracts, as most warranties used in cargo policies are warranties that need to be complied before the risk attaches. However, the potential impact of s. 11 of the 2015 Act in the context of cargo insurance is less certain and, as illustrated with examples in this paper, difficulties are likely to arise as to whether it will apply in various instances.

Also, the manner in which s. 11 is worded leaves open to debate whether it can be relevant in the context of implied voyage conditions stipulated in the MIA 1906, although for standard cargo policies the significance of such conditions has been extensively reduced.

It is the view of the author that it will take a while for courts to provide guidance as to how a term that describes the risk generally can be distinguished from one that tends to reduce the risk of loss of a particular kind or at a particular location or at a particular time. The distinction can be a fine one but will have a significant impact in determining the role that s. 11 of the 2015 Act will play in cases where a loss arises during the period of breach of a warranty or any other similar term.

It is too early to speculate at this stage whether cargo insurers will opt to contract out of the new regime or whether they will give an option to assureds to choose between the old and new regime with different levels of premium. However, one thing is clear: nothing will be the same again after the Insurance Act 2015 comes into force.

APPENDIX 1

– UCP 600 –

Uniform customs and practice for documentary
credits (2007 revision)

ICC Publication No. 600E – ISBN 92.842.1257.X / 978.92.842.1257.6
Published in its official English version by the International Chamber of Commerce

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Uniform customs and practice for documentary credits (2007 revision)

Article 1 Application of UCP

The *Uniform Customs and Practice for Documentary Credits, 2007 Revision*, ICC Publication No. 600 (“UCP”) are rules that apply to any documentary credit (“credit”) (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit.

Article 2 Definitions

For the purpose of these rules:

Advising bank means the bank that advises the credit at the request of the issuing bank.

Applicant means the party on whose request the credit is issued.

Banking day means a day on which a bank is regularly open at the place at which an act subject to these rules is to be performed.

Beneficiary means the party in whose favour a credit is issued.

Complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.

Text published by arrangement with ICC through ICC services-Publications from: *Uniform Customs and Practice for Documentary Credit, UCP 600*, ICC Publication No. 600 – ISBN 978.92.842. 1257-6 © 2006 - International Chamber of Commerce (ICC) available on www.storeiccwbo.org

Confirmation means a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation.

Confirming bank means the bank that adds its confirmation to a credit upon the issuing bank's authorization or request.

Credit means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.

Honour means:

- a. to pay at sight if the credit is available by sight payment.
- b. to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment.
- c. to accept a bill of exchange ("draft") drawn by the beneficiary and pay at maturity if the credit is available by acceptance.

Issuing bank means the bank that issues a credit at the request of an applicant or on its own behalf.

Negotiation means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.

Nominated bank means the bank with which the credit is available or any bank in the case of a credit available with any bank.

Presentation means either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered.

Presenter means a beneficiary, bank or other party that makes a presentation.

Article 3 Interpretations

For the purpose of these rules:

Where applicable, words in the singular include the plural and in the plural include the singular.

A credit is irrevocable even if there is no indication to that effect.

A document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol or any other mechanical or electronic method of authentication.

A requirement for a document to be legalized, visaed, certified or similar will be satisfied by any signature, mark, stamp or label on the document which appears to satisfy that requirement.

Branches of a bank in different countries are considered to be separate banks.

Terms such as "first class", "well known", "qualified", "independent", "official", "competent" or "local" used to describe the issuer of a document allow any issuer except the beneficiary to issue that document.

Unless required to be used in a document, words such as "prompt", "immediately" or "as soon as possible" will be disregarded.

The expression "on or about" or similar will be interpreted as a stipulation that an event is to occur during a period of five calendar days before until five calendar days after the specified date, both start and end dates included.

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The words “to”, “until”, “till”, “from” and “between” when used to determine a period of shipment include the date or dates mentioned, and the words “before” and “after” exclude the date mentioned.

The words “from” and “after” when used to determine a maturity date exclude the date mentioned.

The terms “first half” and “second half” of a month shall be construed respectively as the 1st to the 15th and the 16th to the last day of the month, all dates inclusive.

The terms “beginning”, “middle” and “end” of a month shall be construed respectively as the 1st to the 10th, the 11th to the 20th and the 21st to the last day of the month, all dates inclusive.

Article 4 Credits v. Contracts

- a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.
A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.
- b. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like.

Article 5 Documents v. goods, services or performance

Banks deal with documents and not with goods, services or performance to which the documents may relate.

Article 6 Availability, expiry date and place for presentation

- a. A credit must state the bank with which it is available or whether it is available with any bank. A credit available with a nominated bank is also available with the issuing bank.
- b. A credit must state whether it is available by sight payment, deferred payment, acceptance or negotiation.
- c. A credit must not be issued available by a draft drawn on the applicant.
- d.
 - i. A credit must state an expiry date for presentation. An expiry date stated for honour or negotiation will be deemed to be an expiry date for presentation.
 - ii. The place of the bank with which the credit is available is the place for presentation. The place for presentation under a credit available with any bank is that of any bank. A place for presentation other than that of the issuing bank is in addition to the place of the issuing bank.
- e. Except as provided in sub-article 29 (a), a presentation by or on behalf of the beneficiary must be made on or before the expiry date.

Article 7 Issuing bank undertaking

- a. Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by:
 - i. sight payment, deferred payment or acceptance with the issuing bank;
 - ii. sight payment with a nominated bank and that nominated bank does not pay;
 - iii. deferred payment with a nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;
 - iv. acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;
 - v. negotiation with a nominated bank and that nominated bank does not negotiate.
- b. An issuing bank is irrevocably bound to honour as of the time it issues the credit.
- c. An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary.

Article 8 Confirming bank undertaking

- a. Provided that the stipulated documents are presented to the confirming bank or to any other nominated bank and that they constitute a complying presentation, the confirming bank must:
 - i. honour, if the credit is available by
 - a) sight payment, deferred payment or acceptance with the confirming bank;
 - b) sight payment with another nominated bank and that nominated bank does not pay;
 - c) deferred payment with another nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;
 - d) acceptance with another nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;
 - e) negotiation with another nominated bank and that nominated bank does not negotiate.
 - ii. negotiate, without recourse, if the credit is available by negotiation with the confirming bank.
- b. A confirming bank is irrevocably bound to honour or negotiate as of the time it adds its confirmation to the credit.

- c. A confirming bank undertakes to reimburse another nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the confirming bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not another nominated bank prepaid or purchased before maturity. A confirming bank's undertaking to reimburse another nominated bank is independent of the confirming bank's undertaking to the beneficiary.
- d. If a bank is authorized or requested by the issuing bank to confirm a credit but is not prepared to do so, it must inform the issuing bank without delay and may advise the credit without confirmation.

Article 9 Advising of credits and amendments

- a. A credit and any amendment may be advised to a beneficiary through an advising bank. An advising bank that is not a confirming bank advises the credit and any amendment without any undertaking to honour or negotiate.
- b. By advising the credit or amendment, the advising bank signifies that it has satisfied itself as to the apparent authenticity of the credit or amendment and that the advice accurately reflects the terms and conditions of the credit or amendment received.
- c. An advising bank may utilize the services of another bank ("second advising bank") to advise the credit and any amendment to the beneficiary. By advising the credit or amendment, the second advising bank signifies that it has satisfied itself as to the apparent authenticity of the advice it has received and that the advice accurately reflects the terms and conditions of the credit or amendment received.
- d. A bank utilizing the services of an advising bank or second advising bank to advise a credit must use the same bank to advise any amendment thereto.
- e. If a bank is requested to advise a credit or amendment but elects not to do so, it must so inform, without delay, the bank from which the credit, amendment or advice has been received.
- f. If a bank is requested to advise a credit or amendment but cannot satisfy itself as to the apparent authenticity of the credit, the amendment or the advice, it must so inform, without delay, the bank from which the instructions appear to have been received. If the advising bank or second advising bank elects nonetheless to advise the credit or amendment, it must inform the beneficiary or second advising bank that it has not been able to satisfy itself as to the apparent authenticity of the credit, the amendment or the advice.

Article 10 Amendments

- a. Except as otherwise provided by article 38, a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary.
- b. An issuing bank is irrevocably bound by an amendment as of the time it issues the amendment. A confirming bank may extend its confirmation to an amendment

and will be irrevocably bound as of the time it advises the amendment. A confirming bank may, however, choose to advise an amendment without extending its confirmation and, if so, it must inform the issuing bank without delay and inform the beneficiary in its advice.

- c. The terms and conditions of the original credit (or a credit incorporating previously accepted amendments) will remain in force for the beneficiary until the beneficiary communicates its acceptance of the amendment to the bank that advised such amendment. The beneficiary should give notification of acceptance or rejection of an amendment. If the beneficiary fails to give such notification, a presentation that complies with the credit and to any not yet accepted amendment will be deemed to be notification of acceptance by the beneficiary of such amendment. As of that moment the credit will be amended.
- d. A bank that advises an amendment should inform the bank from which it received the amendment of any notification of acceptance or rejection.
- e. Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment.
- f. A provision in an amendment to the effect that the amendment shall enter into force unless rejected by the beneficiary within a certain time shall be disregarded.

Article 11 Teletransmitted and pre-advised credits and amendments

- a. An authenticated teletransmission of a credit or amendment will be deemed to be the operative credit or amendment, and any subsequent mail confirmation shall be disregarded.

If a teletransmission states “full details to follow” (or words of similar effect), or states that the mail confirmation is to be the operative credit or amendment, then the teletransmission will not be deemed to be the operative credit or amendment. The issuing bank must then issue the operative credit or amendment without delay in terms not inconsistent with the teletransmission.

- b. A preliminary advice of the issuance of a credit or amendment (“pre-advice”) shall only be sent if the issuing bank is prepared to issue the operative credit or amendment. An issuing bank that sends a pre-advice is irrevocably committed to issue the operative credit or amendment, without delay, in terms not inconsistent with the pre-advice.

Article 12 Nomination

- a. Unless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary.
- b. By nominating a bank to accept a draft or incur a deferred payment undertaking, an issuing bank authorizes that nominated bank to prepay or purchase a draft accepted or a deferred payment undertaking incurred by that nominated bank.

- c. Receipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to honour or negotiate, nor does it constitute honour or negotiation.

Article 13 Bank-to-bank reimbursement arrangements

- a. If a credit states that reimbursement is to be obtained by a nominated bank (“claiming bank”) claiming on another party (“reimbursing bank”), the credit must state if the reimbursement is subject to the ICC rules for bank-to-bank reimbursements in effect on the date of issuance of the credit.
- b. If a credit does not state that reimbursement is subject to the ICC rules for bank-to-bank reimbursements, the following apply:
 - i. An issuing bank must provide a reimbursing bank with a reimbursement authorization that conforms with the availability stated in the credit. The reimbursement authorization should not be subject to an expiry date.
 - ii. A claiming bank shall not be required to supply a reimbursing bank with a certificate of compliance with the terms and conditions of the credit.
 - iii. An issuing bank will be responsible for any loss of interest, together with any expenses incurred, if reimbursement is not provided on first demand by a reimbursing bank in accordance with the terms and conditions of the credit.
 - iv. A reimbursing bank’s charges are for the account of the issuing bank. However, if the charges are for the account of the beneficiary, it is the responsibility of an issuing bank to so indicate in the credit and in the reimbursement authorization. If a reimbursing bank’s charges are for the account of the beneficiary, they shall be deducted from the amount due to a claiming bank when reimbursement is made. If no reimbursement is made, the reimbursing bank’s charges remain the obligation of the issuing bank.
- c. An issuing bank is not relieved of any of its obligations to provide reimbursement if reimbursement is not made by a reimbursing bank on first demand.

Article 14 Standard for examination of documents

- a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.
- b. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.
- c. A presentation including one or more original transport documents subject to articles 19, 20, 21, 22, 23, 24 or 25 must be made by or on behalf of the beneficiary not later than 21 calendar days after the date of shipment as described in these rules, but in any event not later than the expiry date of the credit.

- d. Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.
- e. In documents other than the commercial invoice, the description of the goods, services or performance, if stated, may be in general terms not conflicting with their description in the credit.
- f. If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14 (d).
- g. A document presented but not required by the credit will be disregarded and may be returned to the presenter.
- h. If a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it.
- i. A document may be dated prior to the issuance date of the credit, but must not be dated later than its date of presentation.
- j. When the addresses of the beneficiary and the applicant appear in any stipulated document, they need not be the same as those stated in the credit or in any other stipulated document, but must be within the same country as the respective addresses mentioned in the credit. Contact details (telefax, telephone, email and the like) stated as part of the beneficiary's and the applicant's address will be disregarded. However, when the address and contact details of the applicant appear as part of the consignee or notify party details on a transport document subject to articles 19, 20, 21, 22, 23, 24 or 25, they must be as stated in the credit.
- k. The shipper or consignor of the goods indicated on any document need not be the beneficiary of the credit.
- l. A transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules.

Article 15 Complying presentation

- a. When an issuing bank determines that a presentation is complying, it must honour.
- b. When a confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank.
- c. When a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank.

Article 16 Discrepant documents, waiver and notice

- a. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.

- b. When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b).
- c. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.

The notice must state:

- i. that the bank is refusing to honour or negotiate; and
- ii. each discrepancy in respect of which the bank refuses to honour or negotiate; and
- iii.
 - a) that the bank is holding the documents pending further instructions from the presenter; or
 - b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or
 - c) that the bank is returning the documents; or
 - d) that the bank is acting in accordance with instructions previously received from the presenter.
- d. The notice required in sub-article 16 (c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.
- e. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may, after providing notice required by sub-article 16 (c) (iii) (a) or (b), return the documents to the presenter at any time.
- f. If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.
- g. When an issuing bank refuses to honour or a confirming bank refuses to honour or negotiate and has given notice to that effect in accordance with this article, it shall then be entitled to claim a refund, with interest, of any reimbursement made.

Article 17 Original documents and copies

- a. At least one original of each document stipulated in the credit must be presented.
- b. A bank shall treat as an original any document bearing an apparently original signature, mark, stamp, or label of the issuer of the document, unless the document itself indicates that it is not an original.
- c. Unless a document indicates otherwise, a bank will also accept a document as original if it:
 - i. appears to be written, typed, perforated or stamped by the document issuer's hand; or
 - ii. appears to be on the document issuer's original stationery; or
 - iii. states that it is original, unless the statement appears not to apply to the document presented.

- d. If a credit requires presentation of copies of documents, presentation of either originals or copies is permitted.
- e. If a credit requires presentation of multiple documents by using terms such as “in duplicate”, “in two fold” or “in two copies”, this will be satisfied by the presentation of at least one original and the remaining number in copies, except when the document itself indicates otherwise.

Article 18 Commercial invoice

- a. A commercial invoice:
 - i. must appear to have been issued by the beneficiary (except as provided in article 38);
 - ii. must be made out in the name of the applicant (except as provided in sub-article 38 (g));
 - iii. must be made out in the same currency as the credit; and
 - iv. need not be signed.
- b. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding upon all parties, provided the bank in question has not honoured or negotiated for an amount in excess of that permitted by the credit.
- c. The description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.

Article 19 Transport document covering at least two different modes of transport

- a. A transport document covering at least two different modes of transport (multi-modal or combined transport document), however named, must appear to:
 - i. indicate the name of the carrier and be signed by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.
 - ii. indicate that the goods have been dispatched, taken in charge or shipped on board at the place stated in the credit, by:
 - pre-printed wording, or
 - a stamp or notation indicating the date on which the goods have been dispatched, taken in charge or shipped on board.

The date of issuance of the transport document will be deemed to be the date of dispatch, taking in charge or shipped on board, and the date of shipment. However, if the transport document indicates, by stamp or notation, a date of dispatch, taking in charge or shipped on board, this date will be deemed to be the date of shipment.

- iii. indicate the place of dispatch, taking in charge or shipment, and the place of final destination stated in the credit, even if:
 - a) the transport document states, in addition, a different place of dispatch, taking in charge or shipment or place of final destination, or
 - b) the transport document contains the indication “intended” or similar qualification in relation to the vessel, port of loading or port of discharge.
- iv. be the sole original transport document or, if issued in more than one original, be the full set as indicated on the transport document.
- v. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back transport document). Contents of terms and conditions of carriage will not be examined.
- vi. contain no indication that it is subject to a charter party.
- b. For the purpose of this article, transshipment means unloading from one means of conveyance and reloading to another means of conveyance (whether or not in different modes of transport) during the carriage from the place of dispatch, taking in charge or shipment to the place of final destination stated in the credit.
- c.
 - i. A transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.
 - ii. A transport document indicating that transshipment will or may take place is acceptable, even if the credit prohibits transshipment.

Article 20 Bill of lading

- a. A bill of lading, however named, must appear to:
 - i. indicate the name of the carrier and be signed by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.
 - ii. indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:
 - pre-printed wording, or
 - an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the bill of lading will be deemed to be the date of shipment unless the bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

If the bill of lading contains the indication “intended vessel” or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.

- iii. indicate shipment from the port of loading to the port of discharge stated in the credit.

If the bill of lading does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication “intended” or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the bill of lading.

- iv. be the sole original bill of lading or, if issued in more than one original, be the full set as indicated on the bill of lading.
- v. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back bill of lading). Contents of terms and conditions of carriage will not be examined.
- vi. contain no indication that it is subject to a charter party.
- b. For the purpose of this article, transshipment means unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit.
- c.
 - i. A bill of lading may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same bill of lading.
 - ii. A bill of lading indicating that transshipment will or may take place is acceptable, even if the credit prohibits transshipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the bill of lading.
- d. Clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded.

Article 21 Non-negotiable sea waybill

- a. A non-negotiable sea waybill, however named, must appear to:
 - i. indicate the name of the carrier and be signed by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.
 - ii. indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:
 - pre-printed wording, or
 - an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the non-negotiable sea waybill will be deemed to be the date of shipment unless the non-negotiable sea waybill contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

If the non-negotiable sea waybill contains the indication “intended vessel” or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.

- iii. indicate shipment from the port of loading to the port of discharge stated in the credit.

If the non-negotiable sea waybill does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication “intended” or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the non-negotiable sea waybill.

- iv. be the sole original non-negotiable sea waybill or, if issued in more than one original, be the full set as indicated on the non-negotiable sea waybill.
- v. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back non-negotiable sea waybill). Contents of terms and conditions of carriage will not be examined.
- vi. contain no indication that it is subject to a charter party.
- b. For the purpose of this article, transshipment means unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit.
- c.
 - i. A non-negotiable sea waybill may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same non-negotiable sea waybill.
 - ii. A non-negotiable sea waybill indicating that transshipment will or may take place is acceptable, even if the credit prohibits transshipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the non-negotiable sea waybill.
- d. Clauses in a non-negotiable sea waybill stating that the carrier reserves the right to tranship will be disregarded.

Article 22 Charter party bill of lading

- a. A bill of lading, however named, containing an indication that it is subject to a charter party (charter party bill of lading), must appear to:
 - i. be signed by:
 - the master or a named agent for or on behalf of the master, or
 - the owner or a named agent for or on behalf of the owner, or
 - the charterer or a named agent for or on behalf of the charterer.

Any signature by the master, owner, charterer or agent must be identified as that of the master, owner, charterer or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the master, owner or charterer.

An agent signing for or on behalf of the owner or charterer must indicate the name of the owner or charterer.

- ii. indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:
 - pre-printed wording, or
 - an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the charter party bill of lading will be deemed to be the date of shipment unless the charter party bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

- iii. indicate shipment from the port of loading to the port of discharge stated in the credit. The port of discharge may also be shown as a range of ports or a geographical area, as stated in the credit.
 - iv. be the sole original charter party bill of lading or, if issued in more than one original, be the full set as indicated on the charter party bill of lading.
- b. A bank will not examine charter party contracts, even if they are required to be presented by the terms of the credit.

Article 23 Air transport document

- a. An air transport document, however named, must appear to:

- i. indicate the name of the carrier and be signed by:
 - the carrier, or
 - a named agent for or on behalf of the carrier.

Any signature by the carrier or agent must be identified as that of the carrier or agent.

Any signature by an agent must indicate that the agent has signed for or on behalf of the carrier.

- ii. indicate that the goods have been accepted for carriage.
- iii. indicate the date of issuance. This date will be deemed to be the date of shipment unless the air transport document contains a specific notation of the actual date of shipment, in which case the date stated in the notation will be deemed to be the date of shipment.

Any other information appearing on the air transport document relative to the flight number and date will not be considered in determining the date of shipment.

- iv. indicate the airport of departure and the airport of destination stated in the credit.
- v. be the original for consignor or shipper, even if the credit stipulates a full set of originals.
- vi. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage. Contents of terms and conditions of carriage will not be examined.

- b. For the purpose of this article, transshipment means unloading from one aircraft and reloading to another aircraft during the carriage from the airport of departure to the airport of destination stated in the credit.
- c.
 - i. An air transport document may indicate that the goods will or may be transhipped, provided that the entire carriage is covered by one and the same air transport document.
 - ii. An air transport document indicating that transshipment will or may take place is acceptable, even if the credit prohibits transshipment.

Article 24 Road, rail or inland waterway transport documents

- a. A road, rail or inland waterway transport document, however named, must appear to:
 - i. indicate the name of the carrier and:
 - be signed by the carrier or a named agent for or on behalf of the carrier, or
 - indicate receipt of the goods by signature, stamp or notation by the carrier or a named agent for or on behalf of the carrier.

Any signature, stamp or notation of receipt of the goods by the carrier or agent must be identified as that of the carrier or agent.

Any signature, stamp or notation of receipt of the goods by the agent must indicate that the agent has signed or acted for or on behalf of the carrier.

If a rail transport document does not identify the carrier, any signature or stamp of the railway company will be accepted as evidence of the document being signed by the carrier.

- ii. indicate the date of shipment or the date the goods have been received for shipment, dispatch or carriage at the place stated in the credit. Unless the transport document contains a dated reception stamp, an indication of the date of receipt or a date of shipment, the date of issuance of the transport document will be deemed to be the date of shipment.
 - iii. indicate the place of shipment and the place of destination stated in the credit.
- b.
 - i. A road transport document must appear to be the original for consignor or shipper or bear no marking indicating for whom the document has been prepared.
 - ii. A rail transport document marked “duplicate” will be accepted as an original.
 - iii. A rail or inland waterway transport document will be accepted as an original whether marked as an original or not.
- c. In the absence of an indication on the transport document as to the number of originals issued, the number presented will be deemed to constitute a full set.
- d. For the purpose of this article, transshipment means unloading from one means of conveyance and reloading to another means of conveyance, within the same mode of transport, during the carriage from the place of shipment, dispatch or carriage to the place of destination stated in the credit.

- e. i. A road, rail or inland waterway transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.
- ii. A road, rail or inland waterway transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

Article 25 Courier receipt, post receipt or certificate of posting

- a. A courier receipt, however named, evidencing receipt of goods for transport, must appear to:
 - i. indicate the name of the courier service and be stamped or signed by the named courier service at the place from which the credit states the goods are to be shipped; and
 - ii. indicate a date of pickup or of receipt or wording to this effect. This date will be deemed to be the date of shipment.
- b. A requirement that courier charges are to be paid or prepaid may be satisfied by a transport document issued by a courier service evidencing that courier charges are for the account of a party other than the consignee.
- c. A post receipt or certificate of posting, however named, evidencing receipt of goods for transport, must appear to be stamped or signed and dated at the place from which the credit states the goods are to be shipped. This date will be deemed to be the date of shipment.

Article 26 “On deck”, “shipper’s load and count”, “said by shipper to contain” and charges additional to freight

- a. A transport document must not indicate that the goods are or will be loaded on deck. A clause on a transport document stating that the goods may be loaded on deck is acceptable.
- b. A transport document bearing a clause such as “shipper’s load and count” and “said by shipper to contain” is acceptable.
- c. A transport document may bear a reference, by stamp or otherwise, to charges additional to the freight.

Article 27 Clean transport document

A bank will only accept a clean transport document. A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging. The word “clean” need not appear on a transport document, even if a credit has a requirement for that transport document to be “clean on board”.

Article 28 Insurance document and coverage

- a. An insurance document, such as an insurance policy, an insurance certificate or a declaration under an open cover, must appear to be issued and signed by an insurance company, an underwriter or their agents or their proxies.
Any signature by an agent or proxy must indicate whether the agent or proxy has signed for or on behalf of the insurance company or underwriter.

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- b. When the insurance document indicates that it has been issued in more than one original, all originals must be presented.
- c. Cover notes will not be accepted.
- d. An insurance policy is acceptable in lieu of an insurance certificate or a declaration under an open cover.
- e. The date of the insurance document must be no later than the date of shipment, unless it appears from the insurance document that the cover is effective from a date not later than the date of shipment.
- f.
 - i. The insurance document must indicate the amount of insurance coverage and be in the same currency as the credit.
 - ii. A requirement in the credit for insurance coverage to be for a percentage of the value of the goods, of the invoice value or similar is deemed to be the minimum amount of coverage required.

 If there is no indication in the credit of the insurance coverage required, the amount of insurance coverage must be at least 110% of the CIF or CIP value of the goods.

 When the CIF or CIP value cannot be determined from the documents, the amount of insurance coverage must be calculated on the basis of the amount for which honour or negotiation is requested or the gross value of the goods as shown on the invoice, whichever is greater.
 - iii. The insurance document must indicate that risks are covered at least between the place of taking in charge or shipment and the place of discharge or final destination as stated in the credit.
- g. A credit should state the type of insurance required and, if any, the additional risks to be covered. An insurance document will be accepted without regard to any risks that are not covered if the credit uses imprecise terms such as “usual risks” or “customary risks”.
- h. When a credit requires insurance against “all risks” and an insurance document is presented containing any “all risks” notation or clause, whether or not bearing the heading “all risks”, the insurance document will be accepted without regard to any risks stated to be excluded.
- i. An insurance document may contain reference to any exclusion clause.
- j. An insurance document may indicate that the cover is subject to a franchise or excess (deductible).

Article 29 Extension of expiry date or last day for presentation

- a. If the expiry date of a credit or the last day for presentation falls on a day when the bank to which presentation is to be made is closed for reasons other than those referred to in article 36, the expiry date or the last day for presentation, as the case may be, will be extended to the first following banking day.
- b. If presentation is made on the first following banking day, a nominated bank must provide the issuing bank or confirming bank with a statement on its covering schedule that the presentation was made within the time limits extended in accordance with sub-article 29 (a).
- c. The latest date for shipment will not be extended as a result of sub-article 29 (a).

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Article 30 Tolerance in credit amount, quantity and unit prices

- a. The words “about” or “approximately” used in connection with the amount of the credit or the quantity or the unit price stated in the credit are to be construed as allowing a tolerance not to exceed 10% more or 10% less than the amount, the quantity or the unit price to which they refer.
- b. A tolerance not to exceed 5% more or 5% less than the quantity of the goods is allowed, provided the credit does not state the quantity in terms of a stipulated number of packing units or individual items and the total amount of the drawings does not exceed the amount of the credit.
- c. Even when partial shipments are not allowed, a tolerance not to exceed 5% less than the amount of the credit is allowed, provided that the quantity of the goods, if stated in the credit, is shipped in full and a unit price, if stated in the credit, is not reduced or that sub-article 30 (b) is not applicable. This tolerance does not apply when the credit stipulates a specific tolerance or uses the expressions referred to in sub-article 30 (a).

Article 31 Partial drawings or shipments

- a. Partial drawings or shipments are allowed.
- b. A presentation consisting of more than one set of transport documents evidencing shipment commencing on the same means of conveyance and for the same journey, provided they indicate the same destination, will not be regarded as covering a partial shipment, even if they indicate different dates of shipment or different ports of loading, places of taking in charge or dispatch. If the presentation consists of more than one set of transport documents, the latest date of shipment as evidenced on any of the sets of transport documents will be regarded as the date of shipment.

A presentation consisting of one or more sets of transport documents evidencing shipment on more than one means of conveyance within the same mode of transport will be regarded as covering a partial shipment, even if the means of conveyance leave on the same day for the same destination.

- c. A presentation consisting of more than one courier receipt, post receipt or certificate of posting will not be regarded as a partial shipment if the courier receipts, post receipts or certificates of posting appear to have been stamped or signed by the same courier or postal service at the same place and date and for the same destination.

Article 32 Instalment drawings or shipments

If a drawing or shipment by instalments within given periods is stipulated in the credit and any instalment is not drawn or shipped within the period allowed for that instalment, the credit ceases to be available for that and any subsequent instalment.

Article 33 Hours of presentation

A bank has no obligation to accept a presentation outside of its banking hours.

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Article 34 Disclaimer on effectiveness of documents

A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person.

Article 35 Disclaimer on transmission and translation

A bank assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit.

If a nominated bank determines that a presentation is complying and forwards the documents to the issuing bank or confirming bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when the documents have been lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.

A bank assumes no liability or responsibility for errors in translation or interpretation of technical terms and may transmit credit terms without translating them.

Article 36 Force majeure

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.

A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.

Article 37 Disclaimer for acts of an instructed party

- a. A bank utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant does so for the account and at the risk of the applicant.
- b. An issuing bank or advising bank assumes no liability or responsibility should the instructions it transmits to another bank not be carried out, even if it has taken the initiative in the choice of that other bank.

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- c. A bank instructing another bank to perform services is liable for any commissions, fees, costs or expenses (“charges”) incurred by that bank in connection with its instructions.
 If a credit states that charges are for the account of the beneficiary and charges cannot be collected or deducted from proceeds, the issuing bank remains liable for payment of charges.
 A credit or amendment should not stipulate that the advising to a beneficiary is conditional upon the receipt by the advising bank or second advising bank of its charges.
- d. The applicant shall be bound by and liable to indemnify a bank against all obligations and responsibilities imposed by foreign laws and usages.

Article 38 Transferable credits

- a. A bank is under no obligation to transfer a credit except to the extent and in the manner expressly consented to by that bank.
- b. For the purpose of this article:
 Transferable credit means a credit that specifically states it is “transferable”. A transferable credit may be made available in whole or in part to another beneficiary (“second beneficiary”) at the request of the beneficiary (“first beneficiary”).
 Transferring bank means a nominated bank that transfers the credit or, in a credit available with any bank, a bank that is specifically authorized by the issuing bank to transfer and that transfers the credit. An issuing bank may be a transferring bank.
 Transferred credit means a credit that has been made available by the transferring bank to a second beneficiary.
- c. Unless otherwise agreed at the time of transfer, all charges (such as commissions, fees, costs or expenses) incurred in respect of a transfer must be paid by the first beneficiary.
- d. A credit may be transferred in part to more than one second beneficiary provided partial drawings or shipments are allowed.
 A transferred credit cannot be transferred at the request of a second beneficiary to any subsequent beneficiary. The first beneficiary is not considered to be a subsequent beneficiary.
- e. Any request for transfer must indicate if and under what conditions amendments may be advised to the second beneficiary. The transferred credit must clearly indicate those conditions.
- f. If a credit is transferred to more than one second beneficiary, rejection of an amendment by one or more second beneficiary does not invalidate the acceptance by any other second beneficiary, with respect to which the transferred credit will be amended accordingly. For any second beneficiary that rejected the amendment, the transferred credit will remain unamended.

- g. The transferred credit must accurately reflect the terms and conditions of the credit, including confirmation, if any, with the exception of:
- the amount of the credit,
 - any unit price stated therein,
 - the expiry date,
 - the period for presentation, or
 - the latest shipment date or given period for shipment,
- any or all of which may be reduced or curtailed.

The percentage for which insurance cover must be effected may be increased to provide the amount of cover stipulated in the credit or these articles.

The name of the first beneficiary may be substituted for that of the applicant in the credit.

If the name of the applicant is specifically required by the credit to appear in any document other than the invoice, such requirement must be reflected in the transferred credit.

- h. The first beneficiary has the right to substitute its own invoice and draft, if any, for those of a second beneficiary for an amount not in excess of that stipulated in the credit, and upon such substitution the first beneficiary can draw under the credit for the difference, if any, between its invoice and the invoice of a second beneficiary.
- i. If the first beneficiary is to present its own invoice and draft, if any, but fails to do so on first demand, or if the invoices presented by the first beneficiary create discrepancies that did not exist in the presentation made by the second beneficiary and the first beneficiary fails to correct them on first demand, the transferring bank has the right to present the documents as received from the second beneficiary to the issuing bank, without further responsibility to the first beneficiary.
- j. The first beneficiary may, in its request for transfer, indicate that honour or negotiation is to be effected to a second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the credit. This is without prejudice to the right of the first beneficiary in accordance with sub-article 38 (h).
- k. Presentation of documents by or on behalf of a second beneficiary must be made to the transferring bank.

Article 39 Assignment of proceeds

The fact that a credit is not stated to be transferable shall not affect the right of the beneficiary to assign any proceeds to which it may be or may become entitled under the credit, in accordance with the provisions of applicable law. This article relates only to the assignment of proceeds and not to the assignment of the right to perform under the credit.

**Supplement to the uniform customs and practice for
documentary credits for electronic presentation**

Article e1 scope of the eUCP

- a. The Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (“eUCP”) supplements the Uniform Customs and Practice for Documentary Credits (2007 Revision ICC Publication No. 600) (“UCP”) in order to accommodate presentation of electronic records alone or in combination with paper documents.
- b. The eUCP shall apply as a supplement to the UCP where the credit indicates that it is subject to eUCP.
- c. This version is Version 1.1. A credit must indicate the applicable version of the eUCP. If it does not do so, it is subject to the version in effect on the date the credit is issued or, if made subject to eUCP by an amendment accepted by the beneficiary, on the date of that amendment.

Article e2 relationship of the eUCP to the UCP

- a. A credit subject to the eUCP (“eUCP credit”) is also subject to the UCP without express incorporation of the UCP.
- b. Where the eUCP applies, its provisions shall prevail to the extent that they would produce a result different from the application of the UCP.
- c. If an eUCP credit allows the beneficiary to choose between presentation of paper documents or electronic records and it chooses to present only paper documents, the UCP alone shall apply to that presentation. If only paper documents are permitted under an eUCP credit, the UCP alone shall apply.

Article e3 definitions

- a. Where the following terms are used in the UCP, for the purposes of applying the UCP to an electronic record presented under an eUCP credit, the term:
 - i. appear on their face and the like shall apply to examination of the data content of an electronic record.
 - ii. document shall include an electronic record.
 - iii. place for presentation of electronic records means an electronic address.
 - iv. sign and the like shall include an electronic signature.
 - v. superimposed, notation or stamped means data content whose supplementary character is apparent in an electronic record.
- b. The following terms used in the eUCP shall have the following meanings:
 - i. electronic record means
 - data created, generated, sent, communicated, received or stored by electronic means
 - that is capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and

- is capable of being examined for compliance with the terms and conditions of the eUCP credit.
- ii. electronic signature means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person's authentication of the electronic record.
- iii. format means the data organization in which the electronic record is expressed or to which it refers.
- iv. paper document means a document in a traditional paper form.
- v. received means the time when an electronic record enters the information system of the applicable recipient in a form capable of being accepted by that system. Any acknowledgement of receipt does not imply acceptance or refusal of the electronic record under an eUCP credit.

Article e4 format

An eUCP credit must specify the formats in which electronic records are to be presented. If the format of the electronic record is not so specified, it may be presented in any format.

Article e5 presentation

- a. An eUCP credit allowing presentation of:
 - i. electronic records must state a place for presentation of the electronic records.
 - ii. both electronic records and paper documents must also state a place for presentation of the paper documents.
- b. Electronic records may be presented separately and need not be presented at the same time.
- c. If an eUCP credit allows for presentation of one or more electronic records, the beneficiary is responsible for providing a notice to the bank to which presentation is made signifying when the presentation is complete. The notice of completeness may be given as an electronic record or paper document and must identify the eUCP credit to which it relates. Presentation is deemed not to have been made if the beneficiary's notice is not received.
- d.
 - i. Each presentation of an electronic record and the presentation of paper documents under an eUCP credit must identify the eUCP credit under which it is presented.
 - ii. A presentation not so identified may be treated as not received.
- e. If the bank to which presentation is to be made is open but its system is unable to receive a transmitted electronic record on the stipulated expiry date and/or the last day of the period of time after the date of shipment for presentation, as the case may be, the bank will be deemed to be closed and the date for presentation and/or the expiry date shall be extended to the first following banking day on which such bank is able to receive an electronic record. If the only electronic record remaining to be presented is the notice of completeness, it may be given by telecommunications or by paper document and will be deemed timely, provided that it is sent before the bank is able to receive an electronic record.

- f. An electronic record that cannot be authenticated is deemed not to have been presented.

Article e6 examination

- a. If an electronic record contains a hyperlink to an external system or a presentation indicates that the electronic record may be examined by reference to an external system, the electronic record at the hyperlink or the referenced system shall be deemed to be the electronic record to be examined. The failure of the indicated system to provide access to the required electronic record at the time of examination shall constitute a discrepancy.
- b. The forwarding of electronic records by a nominated bank pursuant to its nomination signifies that it has satisfied itself as to the apparent authenticity of the electronic records.
- c. The inability of the issuing bank, or confirming bank, if any, to examine an electronic record in a format required by the eUCP credit or, if no format is required, to examine it in the format presented is not a basis for refusal.

Article e7 notice of refusal

- a.
 - i. The time period for the examination of documents commences on the banking day following the banking day on which the beneficiary's notice of completeness is received.
 - ii. If the time for presentation of documents or the notice of completeness is extended, the time for the examination of documents commences on the first following banking day on which the bank to which presentation is to be made is able to receive the notice of completeness.
- b. If an issuing bank, the confirming bank, if any, or a nominated bank acting on their behalf, provides a notice of refusal of a presentation which includes electronic records and does not receive instructions from the party to which notice of refusal is given within 30 calendar days from the date the notice of refusal is given for the disposition of the electronic records, the bank shall return any paper documents not previously returned to the presenter but may dispose of the electronic records in any manner deemed appropriate without any responsibility.

Article e8 originals and copies

Any requirement of the UCP or an eUCP credit for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record.

Article e9 date of issuance

Unless an electronic record contains a specific date of issuance, the date on which it appears to have been sent by the issuer is deemed to be the date of issuance. The date of receipt will be deemed to be the date it was sent if no other date is apparent.

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Article e10 transport

If an electronic record evidencing transport does not indicate a date of shipment or dispatch, the date of issuance of the electronic record will be deemed to be the date of shipment or dispatch. However, if the electronic record bears a notation that evidences the date of shipment or dispatch, the date of the notation will be deemed to be the date of shipment or dispatch. A notation showing additional data content need not be separately signed or otherwise authenticated.

Article e11 corruption of an electronic record after presentation

- a. If an electronic record that has been received by the issuing bank, confirming bank, or another nominated bank appears to have been corrupted, the bank may inform the presenter and may request that the electronic record be re-presented.
- b. If the bank requests that an electronic record be re-presented:
 - i. the time for examination is suspended and resumes when the presenter re-presents the electronic record; and
 - ii. if the nominated bank is not the confirming bank, it must provide the issuing bank and any confirming bank with notice of the request for re-presentation and inform it of the suspension; but
 - iii. if the same electronic record is not re-presented within thirty (30) calendar days, the bank may treat the electronic record as not presented, and
 - iv. any deadlines are not extended.

Article e12 additional disclaimer of liability for presentation of electronic records under eUCP

By satisfying itself as to the apparent authenticity of an electronic record, banks assume no liability for the identity of the sender, source of the information or its complete and unaltered character other than that which is apparent in the electronic record received by the use of a commercially acceptable data process for the receipt, authentication and identification of electronic records.

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APPENDIX 2

**UNITED NATIONS CONVENTION ON CONTRACTS
FOR THE INTERNATIONAL CARRIAGE OF GOODS
WHOLLY OR PARTLY BY SEA**

ROTTERDAM RULES



UNITED NATIONS
2008

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**UNITED NATIONS CONVENTION ON CONTRACTS FOR
THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY
OR PARTLY BY SEA**

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

Recognizing the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

Mindful of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

Noting that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Have agreed as follows:

Chapter 1
General provisions

Article 1
Definitions

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
4. “Non-liner transportation” means any transportation that is not liner transportation.
5. “Carrier” means a person that enters into a contract of carriage with a shipper.
6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.
7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a

maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. “Shipper” means a person that enters into a contract of carriage with a carrier.

9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Holder” means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to

the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.

21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.
24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.
25. “Ship” means any vessel used to carry goods by sea.
26. “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.
27. “Vehicle” means a road or railroad cargo vehicle.
28. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.
29. “Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.
30. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

Article 2
Interpretation of this Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3
Form requirements

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75,

paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

Article 4

Applicability of defences and limits of liability

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

Chapter 2

Scope of application

Article 5

General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;

- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Article 6
Specific exclusions

1. This Convention does not apply to the following contracts in liner transportation:

- (a) Charter parties; and
- (b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

- (a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and
- (b) A transport document or an electronic transport record is issued.

Article 7
Application to certain parties

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

Chapter 3
Electronic transport records

Article 8
Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9

Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

Article 10

Replacement of negotiable transport document or negotiable electronic transport record

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

Chapter 4

Obligations of the carrier

Article 11

Carriage and delivery of the goods

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

Article 12

Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

Article 13
Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Article 14
Specific obligations applicable to the voyage by sea

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

Article 15

Goods that may become a danger

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

Article 16

Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

Chapter 5

Liability of the carrier for loss, damage or delay

Article 17

Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

- (a) Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;

(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

Article 18 *Liability of the carrier for other persons*

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or
- (d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the

person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

Article 19

Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Article 20

Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

Article 21

Delay

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

Article 22

Calculation of compensation

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.
2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.
3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

Article 23

Notice in case of loss, damage or delay

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.
2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.
3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

Chapter 6

Additional provisions relating to particular stages of carriage

Article 24

Deviation

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

Article 25

Deck cargo on ships

1. Goods may be carried on the deck of a ship only if:

- (a) Such carriage is required by law;
- (b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or
- (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special

risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

Article 26

Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

Chapter 7
Obligations of the shipper to the carrier

Article 27
Delivery for carriage

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.
2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.
3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

Article 28
Cooperation of the shipper and the carrier in providing information and instructions

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

Article 29
Shipper's obligation to provide information, instructions and documents

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage,

provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

Article 30

Basis of shipper's liability to the carrier

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

Article 31

Information for compilation of contract particulars

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

Article 32
Special rules on dangerous goods

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

Article 33
Assumption of shipper's rights and obligations by the documentary shipper

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.
2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

Article 34
Liability of the shipper for other persons

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

Chapter 8
Transport documents and electronic transport records

Article 35

Issuance of the transport document or the electronic transport record

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

Article 36

Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

- (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
- (b) The name and address of the carrier;

(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

(a) The name and address of the consignee, if named by the shipper;

(b) The name of a ship, if specified in the contract of carriage;

(c) The place of receipt and, if known to the carrier, the place of delivery; and

(d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and

(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

Article 37 *Identity of the carrier*

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this

bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

Article 38

Signature

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

Article 39

Deficiencies in the contract particulars

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent

good order and condition at the time the carrier or a performing party received them.

Article 40

Qualifying the information relating to the goods in the contract particulars

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

Article 41

Evidentiary effect of the contract particulars

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following

contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

- (i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;
- (ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and
- (iii) The contract particulars referred to in article 36, paragraph 2.

Article 42
“Freight prepaid”

If the contract particulars contain the statement “freight prepaid” or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

Chapter 9
Delivery of the goods

Article 43
Obligation to accept delivery

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

Article 44
Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

Article 45

Delivery when no negotiable transport document or negotiable electronic transport record is issued

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

Article 46

Delivery when a non-negotiable transport document that requires surrender is issued

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non negotiable document is not surrendered. If more than one original of the non negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

Article 47

Delivery when a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

- (i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or
 - (ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;
- (b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;
- (c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.
2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:
- (a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;
 - (b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

Article 48 *Goods remaining undelivered*

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

- (a) To store the goods at any suitable place;
- (b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and
- (c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

Article 49
Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

Chapter 10
Rights of the controlling party

Article 50
Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

Article 51
Identity of the controlling party and transfer of the right of control

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the

document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Article 52

Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

Article 53 Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

Article 54 Variations to the contract of carriage

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport

document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

Article 55

Providing additional information, instructions or documents to carrier

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

Article 56

Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

Chapter 11

Transfer of rights

Article 57

When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

(a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Article 58
Liability of holder

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 57.

Chapter 12
Limits of liability

Article 59
Limits of liability

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been

declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

Article 60

Limits of liability for loss caused by delay

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

Article 61

Loss of the benefit of limitation of liability

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit

done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

Chapter 13 **Time for suit**

Article 62 *Period of time for suit*

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

Article 63 *Extension of time for suit*

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Article 64
Action for indemnity

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

Article 65
Actions against the person identified as the carrier

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

Chapter 14
Jurisdiction

Article 66
Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

(i) The domicile of the carrier;

- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

Article 67
Choice of court agreements

1. The jurisdiction of a court chosen in accordance with article 66, subparagraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, subparagraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

Article 68

Actions against the maritime performing party

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the maritime performing party; or
- (b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

Article 69

No additional bases of jurisdiction

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.

Article 70

Arrest and provisional or protective measures

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

- (a) The requirements of this chapter are fulfilled; or
- (b) An international convention that applies in that State so provides.

Article 71

Consolidation and removal of actions

1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

Article 72

Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.
2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

Article 73

Recognition and enforcement

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.
2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.
3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

Article 74

Application of chapter 14

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 15
Arbitration

Article 75
Arbitration agreements

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

(a) Any place designated for that purpose in the arbitration agreement; or

(b) Any other place situated in a State where any of the following places is located:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

(a) Is individually negotiated; or

(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

Article 76

Arbitration agreement in non-liner transportation

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

Article 77

Agreement to arbitrate after a dispute has arisen

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

Article 78

Application of chapter 15

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 16

Validity of contractual terms

Article 79

General provisions

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

Article 80
Special rules for volume contracts

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Article 81

Special rules for live animals and certain other goods

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

Chapter 17

Matters not governed by this Convention

Article 82

International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

Article 83

Global limitation of liability

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

Article 84

General average

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

Article 85

Passengers and luggage

This Convention does not apply to a contract of carriage for passengers and their luggage.

Article 86

Damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the

Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

Chapter 18

Final clauses

Article 87 *Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 88 *Signature, ratification, acceptance, approval or accession*

1. This Convention is open for signature by all States at Rotterdam, the Netherlands, on 23 September 2009, and thereafter at the Headquarters of the United Nations in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 89 *Denunciation of other conventions*

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, to the

Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968, or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979, shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

Article 90 Reservations

No reservation is permitted to this Convention.

Article 91 Procedure and effect of declarations

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 92

Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 93

Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that

organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

Article 94
Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 95
Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 96

Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December two thousand and eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

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APPENDIX 3

**The Hague-Visby Rules - The Hague
Rules as Amended by the Brussels
Protocol 1968**

The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968

Article I

In these Rules the following words are employed, with the meanings set out below:

(a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) 'Goods' includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) 'Ship' means any vessel used for the carriage of goods by sea.

(e) 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

Article II

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

Article III

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy;

(b) Properly man, equip and supply the ship;

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the

carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage. 18

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper. 19

(c) The apparent order and condition of the goods. 20

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking. 21

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith. 22

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper. 23

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. 24

The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection. 25

Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen. 26

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods. 27

6 bis. An action for indemnity against a third person may be brought even after the 28

expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

7, After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Article IV

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier.

(c) Perils, dangers and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

- (g) Arrest or restraint of princes, rulers or people, or seizure under legal process. 40
- (h) Quarantine restrictions. 41
- (i) Act or omission of the shipper or owner of the goods, his agent or representative. 42
- (j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general. 43
- (k) Riots and civil commotions. 44
- (l) Saving or attempting to save life or property at sea. 45
- (m) Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods. 46
- (n) Insufficiency of packing. 47
- (o) Insufficiency or inadequacy of marks. 48
- (p) Latent defects not discoverable by due diligence. 49
- (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. 50
3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants. 51
4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom. 52
- 5 (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher. 53
- (b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. 54
- The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality. 55

(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit. 56

(d) The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in h_visby/art/art04_5asub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case. 57

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result. 58

(f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier. 59

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph. 60

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading. 61

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. 62

Article IV bis 63

1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort. 64

2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to 65

avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules. 66

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result. 67

Article V 68

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of these Rules shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average. 69

Article VI 70

Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such. 71

An agreement so entered into shall have full legal effect. 72

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. 73

Article VII 74

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the 75

custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

Article VIII

76

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

77

Article IX

78

These Rules shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.

79

Article X

80

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if

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(a) the bill of lading is issued in a contracting State, or

82

(b) the carriage is from a port in a contracting State, or

83

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract;

84

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

85

(The last two paragraphs of this Article are not reproduced. They require contracting States to apply the Rules to bills of lading mentioned in the Article and authorise them to apply the Rules to other bills of lading).

86

(Article 11 to 16 of the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on August 25, 1974 are not reproduced. They deal with the coming into force of the Convention, procedure for ratification, accession and denunciation and the right to call for a fresh conference to consider amendments to the Rules contained in the Convention).

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APPENDIX 4

ELIZABETH II



Carriage of Goods by Sea Act 1992

1992 CHAPTER 50

An Act to replace the Bills of Lading Act 1855 with new provision with respect to bills of lading and certain other shipping documents.
[16th July 1992]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

- 1.—(1) This Act applies to the following documents, that is to say—
- (a) any bill of lading;
 - (b) any sea waybill; and
 - (c) any ship's delivery order.
- (2) References in this Act to a bill of lading—
- (a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but
 - (b) subject to that, do include references to a received for shipment bill of lading.
- (3) References in this Act to a sea waybill are references to any document which is not a bill of lading but—
- (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and
 - (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.
- (4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which—

Shipping documents etc. to which Act applies.

- (a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and
- (b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to—

- (a) the issue of a document to which this Act applies;
- (b) the indorsement, delivery or other transfer of such a document; or
- (c) the doing of anything else in relation to such a document.

(6) Regulations under subsection (5) above may—

- (a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and
- (b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Rights under
shipping
documents.

2.—(1) Subject to the following provisions of this section, a person who becomes—

- (a) the lawful holder of a bill of lading;
- (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or
- (c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—

- (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

- (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order—

- (a) shall be so vested subject to the terms of the order; and
- (b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any document to which this Act applies—

- (a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but
- (b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives—

- (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or
- (b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

3.—(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—

Liabilities under shipping documents.

- (a) takes or demands delivery from the carrier of any of the goods to which the document relates;
- (b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

- (c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

(2) Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.

(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

Representations in bills of lading.

4. A bill of lading which—

- (a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and
(b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

Interpretation etc.

5.—(1) In this Act—

“bill of lading”, “sea waybill” and “ship's delivery order” shall be construed in accordance with section 1 above;

“the contract of carriage”—

- (a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and
(b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given;

“holder”, in relation to a bill of lading, shall be construed in accordance with subsection (2) below;

“information technology” includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form; and

“telecommunication system” has the same meaning as in the Telecommunications Act 1984.

1984 c. 12.

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—

- (a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

- (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;
- (c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

(3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly.

(4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates—

- (a) cease to exist after the issue of the document; or
- (b) cannot be identified (whether because they are mixed with other goods or for any other reason);

and references in this Act to the goods to which a document relates shall be construed accordingly.

(5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971.

1971 c. 19.

6.—(1) This Act may be cited as the Carriage of Goods by Sea Act 1992.

(2) The Bills of Lading Act 1855 is hereby repealed.

(3) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed; but nothing in this Act shall have effect in relation to any document issued before the coming into force of this Act.

(4) This Act extends to Northern Ireland.

Short title, repeal,
commencement
and extent.
1855 c. 111.

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Insurance Act 2015

CHAPTER 4

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ELIZABETH II



Insurance Act 2015

2015 CHAPTER 4

An Act to make new provision about insurance contracts; to amend the Third Parties (Rights against Insurers) Act 2010 in relation to the insured persons to whom that Act applies; and for connected purposes. [12th February 2015]

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

INSURANCE CONTRACTS: MAIN DEFINITIONS

1 Insurance contracts: main definitions

In this Act (apart from Part 6)—

“consumer insurance contract” has the same meaning as in the Consumer Insurance (Disclosure and Representations) Act 2012;

“non-consumer insurance contract” means a contract of insurance that is not a consumer insurance contract;

“insured” means the party to a contract of insurance who is the insured under the contract, or would be if the contract were entered into;

“insurer” means the party to a contract of insurance who is the insurer under the contract, or would be if the contract were entered into;

“the duty of fair presentation” means the duty imposed by section 3(1).

PART 2

THE DUTY OF FAIR PRESENTATION

2 Application and interpretation

- (1) This Part applies to non-consumer insurance contracts only.

- (2) This Part applies in relation to variations of non-consumer insurance contracts as it applies to contracts, but—
 - (a) references to the risk are to be read as references to changes in the risk relevant to the proposed variation, and
 - (b) references to the contract of insurance are to the variation.

3 The duty of fair presentation

- (1) Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.
- (2) The duty imposed by subsection (1) is referred to in this Act as “the duty of fair presentation”.
- (3) A fair presentation of the risk is one—
 - (a) which makes the disclosure required by subsection (4),
 - (b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and
 - (c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.
- (4) The disclosure required is as follows, except as provided in subsection (5)—
 - (a) disclosure of every material circumstance which the insured knows or ought to know, or
 - (b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.
- (5) In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if—
 - (a) it diminishes the risk,
 - (b) the insurer knows it,
 - (c) the insurer ought to know it,
 - (d) the insurer is presumed to know it, or
 - (e) it is something as to which the insurer waives information.
- (6) Sections 4 to 6 make further provision about the knowledge of the insured and of the insurer, and section 7 contains supplementary provision.

4 Knowledge of insured

- (1) This section provides for what an insured knows or ought to know for the purposes of section 3(4)(a).
- (2) An insured who is an individual knows only—
 - (a) what is known to the individual, and
 - (b) what is known to one or more of the individuals who are responsible for the insured’s insurance.
- (3) An insured who is not an individual knows only what is known to one or more of the individuals who are—
 - (a) part of the insured’s senior management, or
 - (b) responsible for the insured’s insurance.

- (4) An insured is not by virtue of subsection (2)(b) or (3)(b) taken to know confidential information known to an individual if—
 - (a) the individual is, or is an employee of, the insured’s agent; and
 - (b) the information was acquired by the insured’s agent (or by an employee of that agent) through a business relationship with a person who is not connected with the contract of insurance.
- (5) For the purposes of subsection (4) the persons connected with a contract of insurance are—
 - (a) the insured and any other persons for whom cover is provided by the contract, and
 - (b) if the contract re-insures risks covered by another contract, the persons who are (by virtue of this subsection) connected with that other contract.
- (6) Whether an individual or not, an insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means).
- (7) In subsection (6) “information” includes information held within the insured’s organisation or by any other person (such as the insured’s agent or a person for whom cover is provided by the contract of insurance).
- (8) For the purposes of this section—
 - (a) “employee”, in relation to the insured’s agent, includes any individual working for the agent, whatever the capacity in which the individual acts,
 - (b) an individual is responsible for the insured’s insurance if the individual participates on behalf of the insured in the process of procuring the insured’s insurance (whether the individual does so as the insured’s employee or agent, as an employee of the insured’s agent or in any other capacity), and
 - (c) “senior management” means those individuals who play significant roles in the making of decisions about how the insured’s activities are to be managed or organised.

5 Knowledge of insurer

- (1) For the purposes of section 3(5)(b), an insurer knows something only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms (whether the individual does so as the insurer’s employee or agent, as an employee of the insurer’s agent or in any other capacity).
- (2) For the purposes of section 3(5)(c), an insurer ought to know something only if—
 - (a) an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information to an individual mentioned in subsection (1), or
 - (b) the relevant information is held by the insurer and is readily available to an individual mentioned in subsection (1).
- (3) For the purposes of section 3(5)(d), an insurer is presumed to know—
 - (a) things which are common knowledge, and

- (b) things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business.

6 Knowledge: general

- (1) For the purposes of sections 3 to 5, references to an individual's knowledge include not only actual knowledge, but also matters which the individual suspected, and of which the individual would have had knowledge but for deliberately refraining from confirming them or enquiring about them.
- (2) Nothing in this Part affects the operation of any rule of law according to which knowledge of a fraud perpetrated by an individual ("F") either on the insured or on the insurer is not to be attributed to the insured or to the insurer (respectively), where—
 - (a) if the fraud is on the insured, F is any of the individuals mentioned in section 4(2)(b) or (3), or
 - (b) if the fraud is on the insurer, F is any of the individuals mentioned in section 5(1).

7 Supplementary

- (1) A fair presentation need not be contained in only one document or oral presentation.
- (2) The term "circumstance" includes any communication made to, or information received by, the insured.
- (3) A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.
- (4) Examples of things which may be material circumstances are—
 - (a) special or unusual facts relating to the risk,
 - (b) any particular concerns which led the insured to seek insurance cover for the risk,
 - (c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.
- (5) A material representation is substantially correct if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material.
- (6) A representation may be withdrawn or corrected before the contract of insurance is entered into.

8 Remedies for breach

- (1) The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer—
 - (a) would not have entered into the contract of insurance at all, or
 - (b) would have done so only on different terms.
- (2) The remedies are set out in Schedule 1.

- (3) A breach for which the insurer has a remedy against the insured is referred to in this Act as a “qualifying breach”.
- (4) A qualifying breach is either –
 - (a) deliberate or reckless, or
 - (b) neither deliberate nor reckless.
- (5) A qualifying breach is deliberate or reckless if the insured –
 - (a) knew that it was in breach of the duty of fair presentation, or
 - (b) did not care whether or not it was in breach of that duty.
- (6) It is for the insurer to show that a qualifying breach was deliberate or reckless.

PART 3

WARRANTIES AND OTHER TERMS

9 Warranties and representations

- (1) This section applies to representations made by the insured in connection with –
 - (a) a proposed non-consumer insurance contract, or
 - (b) a proposed variation to a non-consumer insurance contract.
- (2) Such a representation is not capable of being converted into a warranty by means of any provision of the non-consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).

10 Breach of warranty

- (1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer’s liability under the contract is abolished.
- (2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.
- (3) But subsection (2) does not apply if –
 - (a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,
 - (b) compliance with the warranty is rendered unlawful by any subsequent law, or
 - (c) the insurer waives the breach of warranty.
- (4) Subsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening –
 - (a) before the breach of warranty, or
 - (b) if the breach can be remedied, after it has been remedied.
- (5) For the purposes of this section, a breach of warranty is to be taken as remedied –

- (a) in a case falling within subsection (6), if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties,
 - (b) in any other case, if the insured ceases to be in breach of the warranty.
- (6) A case falls within this subsection if –
 - (a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and
 - (b) that requirement is not complied with.
- (7) In the Marine Insurance Act 1906 –
 - (a) in section 33 (nature of warranty), in subsection (3), the second sentence is omitted,
 - (b) section 34 (when breach of warranty excused) is omitted.

11 Terms not relevant to the actual loss

- (1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following –
 - (a) loss of a particular kind,
 - (b) loss at a particular location,
 - (c) loss at a particular time.
- (2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).
- (3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.
- (4) This section may apply in addition to section 10.

PART 4

FRAUDULENT CLAIMS

12 Remedies for fraudulent claims

- (1) If the insured makes a fraudulent claim under a contract of insurance –
 - (a) the insurer is not liable to pay the claim,
 - (b) the insurer may recover from the insured any sums paid by the insurer to the insured in respect of the claim, and
 - (c) in addition, the insurer may by notice to the insured treat the contract as having been terminated with effect from the time of the fraudulent act.
- (2) If the insurer does treat the contract as having been terminated –
 - (a) it may refuse all liability to the insured under the contract in respect of a relevant event occurring after the time of the fraudulent act, and
 - (b) it need not return any of the premiums paid under the contract.

- (3) Treating a contract as having been terminated under this section does not affect the rights and obligations of the parties to the contract with respect to a relevant event occurring before the time of the fraudulent act.
- (4) In subsections (2)(a) and (3), “relevant event” refers to whatever gives rise to the insurer’s liability under the contract (and includes, for example, the occurrence of a loss, the making of a claim, or the notification of a potential claim, depending on how the contract is written).

13 Remedies for fraudulent claims: group insurance

- (1) This section applies where –
 - (a) a contract of insurance is entered into with an insurer by a person (“A”),
 - (b) the contract provides cover for one or more other persons who are not parties to the contract (“the Cs”), whether or not it also provides cover of any kind for A or another insured party, and
 - (c) a fraudulent claim is made under the contract by or on behalf of one of the Cs (“CF”).
- (2) Section 12 applies in relation to the claim as if the cover provided for CF were provided under an individual insurance contract between the insurer and CF as the insured; and, accordingly –
 - (a) the insurer’s rights under section 12 are exercisable only in relation to the cover provided for CF, and
 - (b) the exercise of any of those rights does not affect the cover provided under the contract for anyone else.
- (3) In its application by virtue of subsection (2), section 12 is subject to the following particular modifications –
 - (a) the first reference to “the insured” in subsection (1)(b) of that section, in respect of any particular sum paid by the insurer, is to whichever of A and CF the insurer paid the sum to; but if a sum was paid to A and passed on by A to CF, the reference is to CF,
 - (b) the second reference to “the insured” in subsection (1)(b) is to A or CF,
 - (c) the reference to “the insured” in subsection (1)(c) is to both CF and A,
 - (d) the reference in subsection (2)(b) to the premiums paid under the contract is to premiums paid in respect of the cover for CF.

PART 5

GOOD FAITH AND CONTRACTING OUT

Good faith

14 Good faith

- (1) Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished.
- (2) Any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.

- (3) Accordingly—
 - (a) in section 17 of the Marine Insurance Act 1906 (marine insurance contracts are contracts of the utmost good faith), the words from “, and” to the end are omitted, and
 - (b) the application of that section (as so amended) is subject to the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.
- (4) In section 2 of the Consumer Insurance (Disclosure and Representations) Act 2012 (disclosure and representations before contract or variation), subsection (5) is omitted.

Contracting out

15 Contracting out: consumer insurance contracts

- (1) A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects any of the matters provided for in Part 3 or 4 of this Act than the consumer would be in by virtue of the provisions of those Parts (so far as relating to consumer insurance contracts) is to that extent of no effect.
- (2) In subsection (1) references to a contract include a variation.
- (3) This section does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

16 Contracting out: non-consumer insurance contracts

- (1) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects representations to which section 9 applies than the insured would be in by virtue of that section is to that extent of no effect.
- (2) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects any of the other matters provided for in Part 2, 3 or 4 of this Act than the insured would be in by virtue of the provisions of those Parts (so far as relating to non-consumer insurance contracts) is to that extent of no effect, unless the requirements of section 17 have been satisfied in relation to the term.
- (3) In this section references to a contract include a variation.
- (4) This section does not apply in relation to a contract for the settlement of a claim arising under a non-consumer insurance contract.

17 The transparency requirements

- (1) In this section, “the disadvantageous term” means such a term as is mentioned in section 16(2).
- (2) The insurer must take sufficient steps to draw the disadvantageous term to the insured’s attention before the contract is entered into or the variation agreed.
- (3) The disadvantageous term must be clear and unambiguous as to its effect.

- (4) In determining whether the requirements of subsections (2) and (3) have been met, the characteristics of insured persons of the kind in question, and the circumstances of the transaction, are to be taken into account.
- (5) The insured may not rely on any failure on the part of the insurer to meet the requirements of subsection (2) if the insured (or its agent) had actual knowledge of the disadvantageous term when the contract was entered into or the variation agreed.

18 Contracting out: group insurance contracts

- (1) This section applies to a contract of insurance referred to in section 13(1)(a); and in this section –
 - “A” and “the Cs” have the same meaning as in section 13,
 - “consumer C” means an individual who is one of the Cs, where the cover provided by the contract for that individual would have been a consumer insurance contract if entered into by that person rather than by A, and
 - “non-consumer C” means any of the Cs who is not a consumer C.
- (2) A term of the contract of insurance, or any other contract, which puts a consumer C in a worse position as respects any matter dealt with in section 13 than that individual would be in by virtue of that section is to that extent of no effect.
- (3) A term of the contract of insurance, or any other contract, which puts a non-consumer C in a worse position as respects any matter dealt with in section 13 than that person would be in by virtue of that section is to that extent of no effect, unless the requirements of section 17 have been met in relation to the term.
- (4) Section 17 applies in relation to such a term as it applies to a term mentioned in section 16(2), with references to the insured being read as references to A rather than the non-consumer C.
- (5) In this section references to a contract include a variation.
- (6) This section does not apply in relation to a contract for the settlement of a claim arising under a contract of insurance to which this section applies.

PART 6

AMENDMENT OF THE THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010

19 Power to change meaning of “relevant person” for purposes of 2010 Act

For section 19 of the Third Parties (Rights against Insurers) Act 2010 (power to amend sections 4 to 6 of the Act) substitute –

“19 Power to change the meaning of “relevant person”

- (1) The Secretary of State may by regulations make provision adding or removing circumstances in which a person is a “relevant person” for the purposes of this Act, subject to subsection (2).
- (2) Regulations under this section may add circumstances only if, in the Secretary of State’s opinion, the additional circumstances –

- (a) involve actual or anticipated dissolution of a body corporate or an unincorporated body,
 - (b) involve actual or anticipated insolvency or other financial difficulties for an individual, a body corporate or an unincorporated body, or
 - (c) are similar to circumstances for the time being described in sections 4 to 7.
- (3) Regulations under this section may make provision about—
 - (a) the persons to whom, and the extent to which, rights are transferred under section 1 in the circumstances added or removed by the regulations (the “affected circumstances”),
 - (b) the re-transfer of rights transferred under section 1 where the affected circumstances change, and
 - (c) the effect of a transfer of rights under section 1 on the liability of the insured in the affected circumstances.
- (4) Regulations under this section which add or remove circumstances involving actual or anticipated dissolution of a body corporate or unincorporated body may change the cases in which the following provisions apply so that they include or exclude cases involving that type of dissolution or any other type of dissolution of a body—
 - (a) section 9(3) (cases in which transferred rights are not subject to a condition requiring the insured to provide information or assistance to the insurer), and
 - (b) paragraph 3 of Schedule 1 (notices requiring disclosure).
- (5) Regulations under this section which add circumstances may provide that section 1 of this Act applies in cases involving those circumstances in which either or both of the following occurred in relation to a person before the day on which the regulations come into force—
 - (a) the circumstances arose in relation to the person;
 - (b) a liability against which the person was insured under an insurance contract was incurred.
- (6) Regulations under this section which—
 - (a) add circumstances, and
 - (b) provide that section 1 of this Act applies in a case involving those circumstances in which both of the events mentioned in subsection (5)(a) and (b) occurred in relation to a person before the day on which the regulations come into force,
 must provide that, in such a case, the person is to be treated for the purposes of this Act as not having become a relevant person until that day or a later day specified in the regulations.
- (7) Regulations under this section which remove circumstances may provide that section 1 of this Act does not apply in cases involving those circumstances in which one of the events mentioned in subsection (5)(a) and (b) (but not both) occurred in relation to a person before the day on which the regulations come into force.
- (8) Regulations under this section may—
 - (a) include consequential, incidental, supplementary, transitional, transitory or saving provision,
 - (b) make different provision for different purposes, and

(c) make provision by reference to an enactment as amended, extended or applied from time to time,
(and subsections (3) to (7) are without prejudice to the generality of this subsection).

- (9) Regulations under this section may amend an enactment, whenever passed or made, including this Act.
- (10) Regulations under this section are to be made by statutory instrument.
- (11) Regulations under this section may not be made unless a draft of the statutory instrument containing the regulations has been laid before, and approved by a resolution of, each House of Parliament.”

20 Other amendments

Schedule 2 amends the Third Parties (Rights against Insurers) Act 2010 in relation to the insured persons to whom the Act applies.

PART 7

GENERAL

21 Provision consequential on Part 2

- (1) The provision made by this section is consequential on Part 2 of this Act.
- (2) In the Marine Insurance Act 1906, sections 18 (disclosure by assured), 19 (disclosure by agent effecting insurance) and 20 (representations pending negotiation of contract) are omitted.
- (3) Any rule of law to the same effect as any of those provisions is abolished.
- (4) In section 152 of the Road Traffic Act 1988 (exceptions to duty of insurers to satisfy judgment against persons insured against third-party risks) –
 - (a) in subsection (2) –
 - (i) in paragraph (a), for “it either under the Consumer Insurance (Disclosure and Representations) Act 2012 or, if that Act does not apply,” substitute “the policy under either of the relevant insurance enactments, or the security”;
 - (ii) in paragraph (b), for “or security under that Act or” substitute “under either of the relevant insurance enactments, or the security”;
 - (b) in subsection (3), after “specifying” insert “the relevant insurance enactment or, in the case of a security,”;
 - (c) after subsection (4) add –
 - “(5) In this section, “relevant insurance enactment” means the Consumer Insurance (Disclosure and Representations) Act 2012 or Part 2 of the Insurance Act 2015.”
- (5) In Article 98A of the Road Traffic (Northern Ireland) Order 1981 (S.I. 1981/154 (N.I.)) (exceptions to duty of insurers to satisfy judgement against persons insured against third party risks) –
 - (a) in paragraph (2) –
 - (i) in paragraph (a), for “it either under the Consumer Insurance Act (Disclosure and Representations) Act 2012 or, if that Act

- does not apply,” substitute “the policy under either of the relevant insurance enactments, or the security”;
- (ii) in paragraph (b), for “or security under that Act or” substitute “under either of the relevant insurance enactments, or the security”;
- (b) in paragraph (3), after “specifying” insert “the relevant insurance enactment or, in the case of a security,”;
- (c) after paragraph (4) add –
 - “(5) In this Article, “relevant insurance enactment” means the Consumer Insurance (Disclosure and Representations) Act 2012 or Part 2 of the Insurance Act 2015.”
- (6) In section 11 of the Consumer Insurance (Disclosure and Representations) Act 2012 (consequential provision), subsections (1) and (2) are omitted.

22 Application etc of Parts 2 to 5

- (1) Part 2 (and section 21) and section 14 apply only in relation to –
 - (a) contracts of insurance entered into after the end of the relevant period, and
 - (b) variations, agreed after the end of the relevant period, to contracts of insurance entered into at any time.
- (2) Parts 3 and 4 of this Act apply only in relation to contracts of insurance entered into after the end of the relevant period, and variations to such contracts.
- (3) In subsections (1) and (2) “the relevant period” means the period of 18 months beginning with the day on which this Act is passed.
- (4) Unless the contrary intention appears, references in Parts 2 to 5 to something being done by or in relation to the insurer or the insured include its being done by or in relation to that person’s agent.

23 Extent, commencement and short title

- (1) This Act extends to England and Wales, Scotland and Northern Ireland, except for –
 - (a) section 21(4), which does not extend to Northern Ireland; and
 - (b) section 21(5), which extends to Northern Ireland only.
- (2) This Act (apart from Part 6 and this section) comes into force at the end of the period of 18 months beginning with the day on which it is passed.
- (3) In Part 6 –
 - (a) section 19 comes into force at the end of the period of two months beginning with the day on which this Act is passed; and
 - (b) section 20 and Schedule 2 come into force on the day appointed under section 21(2) of the Third Parties (Rights against Insurers) Act 2010 for the coming into force of that Act.
- (4) This section comes into force on the day on which this Act is passed.
- (5) This Act may be cited as the Insurance Act 2015.

SCHEDULES

SCHEDULE 1

Section 8(2).

INSURERS' REMEDIES FOR QUALIFYING BREACHES

PART 1

CONTRACTS

General

- 1 This Part of this Schedule applies to qualifying breaches of the duty of fair presentation in relation to non-consumer insurance contracts (for variations to them, see Part 2).

Deliberate or reckless breaches

- 2 If a qualifying breach was deliberate or reckless, the insurer –
- (a) may avoid the contract and refuse all claims, and
 - (b) need not return any of the premiums paid.

Other breaches

- 3 Paragraphs 4 to 6 apply if a qualifying breach was neither deliberate nor reckless.
- 4 If, in the absence of the qualifying breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid.
- 5 If the insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.
- 6 (1) In addition, if the insurer would have entered into the contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim.
- (2) In sub-paragraph (1), “reduce proportionately” means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract (or, if applicable, under the different terms provided for by virtue of paragraph 5), where –

$$X = \frac{\text{Premium actually charged}}{\text{Higher premium}} \times 100$$

PART 2

VARIATIONS

General

- 7 This Part of this Schedule applies to qualifying breaches of the duty of fair presentation in relation to variations to non-consumer insurance contracts.

Deliberate or reckless breaches

- 8 If a qualifying breach was deliberate or reckless, the insurer –
- (a) may by notice to the insured treat the contract as having been terminated with effect from the time when the variation was made, and
 - (b) need not return any of the premiums paid.

Other breaches

- 9 (1) This paragraph applies if –
- (a) a qualifying breach was neither deliberate nor reckless, and
 - (b) the total premium was increased or not changed as a result of the variation.
- (2) If, in the absence of the qualifying breach, the insurer would not have agreed to the variation on any terms, the insurer may treat the contract as if the variation was never made, but must in that event return any extra premium paid.
- (3) If sub-paragraph (2) does not apply –
- (a) if the insurer would have agreed to the variation on different terms (other than terms relating to the premium), the variation is to be treated as if it had been entered into on those different terms if the insurer so requires, and
 - (b) paragraph 11 also applies if (in the case of an increased premium) the insurer would have increased the premium by more than it did, or (in the case of an unchanged premium) the insurer would have increased the premium.
- 10 (1) This paragraph applies if –
- (a) a qualifying breach was neither deliberate nor reckless, and
 - (b) the total premium was reduced as a result of the variation.
- (2) If, in the absence of the qualifying breach, the insurer would not have agreed to the variation on any terms, the insurer may treat the contract as if the variation was never made, and paragraph 11 also applies.
- (3) If sub-paragraph (2) does not apply –
- (a) if the insurer would have agreed to the variation on different terms (other than terms relating to the premium), the variation is to be treated as if it had been entered into on those different terms if the insurer so requires, and
 - (b) paragraph 11 also applies if the insurer would have increased the premium, would not have reduced the premium, or would have reduced it by less than it did.

Proportionate reduction

- 11 (1) If this paragraph applies, the insurer may reduce proportionately the amount to be paid on a claim arising out of events after the variation.
- (2) In sub-paragraph (1), “reduce proportionately” means that the insurer need pay on the claim only Y% of what it would otherwise have been under an obligation to pay under the terms of the contract (whether on the original terms, or as varied, or under the different terms provided for by virtue of paragraph 9(3)(a) or 10(3)(a), as the case may be), where –
- $$Y = \frac{\text{Total premium actually charged}}{P} \times 100$$
- (3) In the formula in sub-paragraph (2), “P” –
- (a) in a paragraph 9(3)(b) case, is the total premium the insurer would have charged,
 - (b) in a paragraph 10(2) case, is the original premium,
 - (c) in a paragraph 10(3)(b) case, is the original premium if the insurer would not have changed it, and otherwise the increased or (as the case may be) reduced total premium the insurer would have charged.

PART 3

SUPPLEMENTARY

Relationship with section 84 of the Marine Insurance Act 1906

- 12 Section 84 of the Marine Insurance Act 1906 (return of premium for failure of consideration) is to be read subject to the provisions of this Schedule in relation to contracts of marine insurance which are non-consumer insurance contracts.

SCHEDULE 2

Section 20

RIGHTS OF THIRD PARTIES AGAINST INSURERS: RELEVANT INSURED PERSONS

- 1 The Third Parties (Rights against Insurers) Act 2010 is amended as follows.

Individuals subject to debt relief orders in Northern Ireland

- 2 (1) Section 4 (relevant persons: individuals) is amended as follows.
- (2) In subsection (3), after paragraph (b) (deed of arrangements registered under the Insolvency (Northern Ireland) Order 1989) insert –
- “(ba) subject to subsection (4), a debt relief order made under Part 7A of that Order,”.
- (3) In subsection (4) (individuals who are relevant persons for the purposes of section 1(1)(b) only), after “(1)(d)” insert “or (3)(ba)”.

Corporate bodies etc in administration

- 3 (1) Section 6 (corporate bodies etc) is amended as follows.
- (2) In subsection (2) (events under the Insolvency Act 1986), for paragraph (b) substitute—
 - “(b) the body is in administration under Schedule B1 to that Act,”.
- (3) In subsection (4) (events under the Insolvency (Northern Ireland) Order 1989), for paragraph (b) substitute—
 - “(b) the body is in administration under Schedule B1 to that Order,”.

Transitional cases

- 4 In section 1(5)(b) (definition of “relevant person”), at the end insert “(and see also paragraph 1A of Schedule 3)”.
- 5 (1) Schedule 3 (transitory, transitional and saving provision) is amended as follows.
 - (2) At the beginning insert—

“*Application of this Act*”.
 - (3) After paragraph 1 insert—

“Relevant persons

- 1A (1) An individual, company or limited liability partnership not within sections 4 to 7 is to be treated as a relevant person for the purposes of this Act in the following cases.
 - (2) The first case is where an individual—
 - (a) became bankrupt before commencement day, and
 - (b) has not been discharged from that bankruptcy.
 - (3) The second case is where—
 - (a) an individual made a composition or arrangement with his or her creditors before commencement day, and
 - (b) the composition or arrangement remains in force.
 - (4) The third case is where—
 - (a) a winding-up order was made, or a resolution for a voluntary winding-up was passed, with respect to a company or limited liability partnership before commencement day, and
 - (b) the company or partnership is still wound up.
 - (5) The fourth case is where a company or limited liability partnership—
 - (a) entered administration before commencement day, and
 - (b) is still in administration.
 - (6) The fifth case is where—

- (a) a receiver or manager of the business or undertaking of a company or limited liability partnership was appointed before commencement day, and
 - (b) the appointment remains in force.
- (7) In those cases, the person is a relevant person only in relation to liabilities under a contract of insurance under which the person was insured at the time of the event mentioned in sub-paragraph (2)(a), (3)(a), (4)(a), (5)(a) or (6)(a) (as appropriate)."
- (4) Before paragraph 2 insert —

"Bankruptcy and Diligence etc (Scotland) Act 2007".
- (5) Before paragraph 3 insert —

"Application of 1930 Acts".
- (6) Before paragraph 5 insert —

"Interpretation".

Interpretation

- 6 After section 19 insert —

"19A Interpretation

- (1) The references to enactments in sections 4 to 7, 9(7) and 14(4) and paragraph 3(2)(b), (4) and (5) of Schedule 1 are to be treated as including references to those enactments as amended, extended or applied by another enactment, whenever passed or made, unless the contrary intention appears.
- (2) In this Act, "enactment" means an enactment contained in, or in an instrument made under, any of the following —
 - (a) an Act;
 - (b) an Act or Measure of the National Assembly for Wales;
 - (c) an Act of the Scottish Parliament;
 - (d) Northern Ireland legislation."

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APPENDIX 6

Institute Cargo Clauses 2009 (A)

RISKS COVERED

Risks

1. This insurance covers all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7 below.

General Average

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of carriage and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 below.

"Both to Blame Collision Clause"

3. This insurance indemnifies the Assured, in respect of any risk insured herein, against liability incurred under any Both to Blame Collision Clause in the contract of carriage. In the event of any claim by carriers under the said Clause, the Assured agree to notify the Insurers who shall have the right, at their own cost and expense, to defend the Assured against such claim.

EXCLUSIONS

4. In no case shall this insurance cover
 - 4.1 loss damage or expense attributable to wilful misconduct of the Assured
 - 4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured
 - 4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance (for the purpose of these Clauses "packing" shall be deemed to include stowage in a container and "employees" shall not include independent contractors)
 - 4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured
 - 4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)
 - 4.6 loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage
This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract
 - 4.7 loss damage or expense directly or indirectly caused by or arising from the use of any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.
5. 5.1 In no case shall this insurance cover loss damage or expense arising from
 - 5.1.1 unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein
 - 5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to attachment of this insurance or by the Assured or their employees and they are privy to such unfitness at the time of loading.
- 5.2 Exclusion 5.1.1 above shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.
- 5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.
6. In no case shall this insurance cover loss damage or expense caused by
 - 6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
 - 6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat
 - 6.3 derelict mines torpedoes bombs or other derelict weapons of war.
7. In no case shall this insurance cover loss damage or expense
 - 7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions
 - 7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions
 - 7.3 caused by any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted

7.4 caused by any person acting from a political, ideological or religious motive.

DURATION

Transit Clause

8. 8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit,

continues during the ordinary course of transit

and terminates either

8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance,

8.1.2 on completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or

8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit or

8.1.4 on the expiry of 60 days after completion of discharge overseas of the subject-matter insured from the overseas vessel at the final port of discharge, whichever shall first occur.

8.2 If, after discharge overseas from the overseas vessel at the final port of discharge, but prior to termination of this insurance, the subject-matter insured is to be forwarded to a destination other than that to which it is insured, this insurance, whilst remaining subject to termination as provided in Clauses 8.1.1 to 8.1.4, shall not extend beyond the time the subject-matter insured is first moved for the purpose of the commencement of transit to such other destination.

8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.

Termination of Contract of Carriage

9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before unloading of the subject-matter insured as provided for in Clause 8 above, then this insurance shall also terminate *unless prompt notice is given to the Insurers and continuation of cover is requested when this insurance shall remain in force, subject to an additional premium if required by the Insurers*, either

9.1 until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur,

or

9.2 if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

Change of Voyage

10.10.1 Where, after attachment of this insurance, the destination is changed by the Assured, *this must be notified promptly to Insurers for rates and terms to be agreed. Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable market terms.*

10.2 Where the subject-matter insured commences the transit contemplated by this insurance (in accordance with Clause 8.1), but, without the knowledge of the Assured or their employees the ship sails for another destination, this insurance will nevertheless be deemed to have attached at commencement of such transit.

CLAIMS

Insurable Interest

11.11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.

11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Insurers were not.

Forwarding Charges

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the

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Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading, storing and forwarding the subject-matter insured to the destination to which it is insured.

This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault, negligence, insolvency or financial default of the Assured or their employees.

Constructive Total Loss

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival.

Increased Value

14.14.1 If any Increased Value insurance is effected by the Assured on the subject-matter insured under this insurance, the agreed value of the subject-matter insured shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim, the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

14.2 Where this insurance is on Increased Value, the following clause shall apply:

The agreed value of the subject-matter insured shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the subject-matter insured by the Assured, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim, the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

BENEFIT OF INSURANCE

15. This insurance

- 15.1 covers the Assured which includes the person claiming indemnity either as the person by or on whose behalf the contract of insurance was effected or as an assignee,
- 15.2 shall not extend to or otherwise benefit the carrier or other bailee.

MINIMISING LOSSES

Duty of Assured

16. It is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder

- 16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and
 - 16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised
- and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

Waiver

17. Measures taken by the Assured or the Insurers with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

NOTE:- Where a continuation of cover is requested under Clause 9, or a change of destination is notified under Clause 10, there is an obligation to give prompt notice to the Insurers and the right to such cover is dependent upon compliance with this obligation.

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Institute Cargo Clauses 2009 (B)

RISKS COVERED

Risks

1. This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below,
 - 1.1 loss of or damage to the subject-matter insured reasonably attributable to
 - 1.1.1 fire or explosion
 - 1.1.2 vessel or craft being stranded grounded sunk or capsized
 - 1.1.3 overturning or derailment of land conveyance
 - 1.1.4 collision or contact of vessel craft or conveyance with any external object other than water
 - 1.1.5 discharge of cargo at a port of distress
 - 1.1.6 earthquake volcanic eruption or lightning,
 - 1.2 loss of or damage to the subject-matter insured caused by
 - 1.2.1 general average sacrifice
 - 1.2.2 jettison or washing overboard
 - 1.2.3 entry of sea lake or river water into vessel craft hold conveyance container or place of storage,
 - 1.3 total loss of any package lost overboard or dropped whilst loading on to, or unloading from, vessel or craft.

General Average

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of carriage and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 below.

"Both to Blame Collision Clause"

3. This insurance indemnifies the Assured, in respect of any risk insured herein, against liability incurred under any Both to Blame Collision Clause in the contract of carriage. In the event of any claim by carriers under the said Clause, the Assured agree to notify the Insurers who shall have the right, at their own cost and expense, to defend the Assured against such claim.

EXCLUSIONS

4. In no case shall this insurance cover
 - 4.1 loss damage or expense attributable to wilful misconduct of the Assured
 - 4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured
 - 4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance (for the purpose of these Clauses "packing" shall be deemed to include stowage in a container and "employees" shall not include independent contractors)
 - 4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured
 - 4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)
 - 4.6 loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage
This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract
 - 4.7 deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons
 - 4.8 loss damage or expense directly or indirectly caused by or arising from the use of any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.
5. In no case shall this insurance cover loss damage or expense arising from
 - 5.1.1 unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein
 - 5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out
prior to attachment of this insurance or
by the Assured or their employees and they are privy to such unfitness at the time of loading.
 - 5.2 Exclusion 5.1.1 above shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.
 - 5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.
6. In no case shall this insurance cover loss damage or expense caused by
 - 6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

- 6.2 capture seizure arrest restraint or detention, and the consequences thereof or any attempt thereat
- 6.3 derelict mines torpedoes bombs or other derelict weapons of war.
- 7. In no case shall this insurance cover loss damage or expense
 - 7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions
 - 7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions
 - 7.3 caused by any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted
 - 7.4 caused by any person acting from a political, ideological or religious motive.

DURATION

Transit Clause

- 8. 8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit, continues during the ordinary course of transit and terminates either
 - 8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance,
 - 8.1.2 on completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or
 - 8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit or
 - 8.1.4 on the expiry of 60 days after completion of discharge overseas of the subject-matter insured from the overseas vessel at the final port of discharge, whichever shall first occur.
- 8.2 If, after discharge overseas from the overseas vessel at the final port of discharge, but prior to termination of this insurance, the subject-matter insured is to be forwarded to a destination other than that to which it is insured, this insurance, whilst remaining subject to termination as provided in Clauses 8.1.1 to 8.1.4, shall not extend beyond the time the subject-matter insured is first moved for the purpose of the commencement of transit to such other destination.
- 8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.

Termination of Contract of Carriage

- 9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before unloading of the subject-matter insured as provided for in Clause 8 above, then this insurance shall also terminate *unless prompt notice is given to the Insurers and continuation of cover is requested when this insurance shall remain in force, subject to an additional premium if required by the Insurers*, either
 - 9.1 until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur, or
 - 9.2 if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

Change of Voyage

- 10. 10.1 Where, after attachment of this insurance, the destination is changed by the Assured, *this must be notified promptly to Insurers for rates and terms to be agreed. Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable market terms.*
- 10.2 Where the subject-matter insured commences the transit contemplated by this insurance (in accordance with Clause 8.1), but, without the knowledge of the Assured or their employees the ship sails for another destination, this insurance will nevertheless be deemed to have attached at commencement of such transit.

CLAIMS

Insurable Interest

- 11. 11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.
- 11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the

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contract of insurance was concluded, unless the Assured were aware of the loss and the Insurers were not.

Forwarding Charges

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading, storing and forwarding the subject-matter insured to the destination to which it is insured.

This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault, negligence, insolvency or financial default of the Assured or their employees.

Constructive Total Loss

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival.

Increased Value

14.1.1 If any Increased Value insurance is effected by the Assured on the subject-matter insured under this insurance the agreed value of the subject-matter insured shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

14.2 Where this insurance is on Increased Value the following clause shall apply:

The agreed value of the subject-matter insured shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the subject-matter insured by the Assured, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

BENEFIT OF INSURANCE

15. This insurance

15.1 covers the Assured which includes the person claiming indemnity either as the person by or on whose behalf the contract of insurance was effected or as an assignee,

15.2 shall not extend to or otherwise benefit the carrier or other bailee.

MINIMISING LOSSES

Duty of Assured

16. It is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised

and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

Waiver

17. Measures taken by the Assured or the Insurers with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

NOTE:- Where a continuation of cover is requested under Clause 9, or a change of destination is notified under Clause 10, there is an obligation to give prompt notice to the Insurers and the right to such cover is dependent upon compliance with this obligation.

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RISKS COVERED

Risks

1. This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below,
 - 1.1 loss of or damage to the subject-matter insured reasonably attributable to
 - 1.1.1 fire or explosion
 - 1.1.2 vessel or craft being stranded grounded sunk or capsized
 - 1.1.3 overturning or derailment of land conveyance
 - 1.1.4 collision or contact of vessel craft or conveyance with any external object other than water
 - 1.1.5 discharge of cargo at a port of distress,
 - 1.2 loss of or damage to the subject-matter insured caused by
 - 1.2.1 general average sacrifice
 - 1.2.2 jettison.

General Average

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of carriage and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 below.

"Both to Blame Collision Clause"

3. This insurance indemnifies the Assured, in respect of any risk insured herein, against liability incurred under any Both to Blame Collision Clause in the contract of carriage. In the event of any claim by carriers under the said Clause, the Assured agree to notify the Insurers who shall have the right, at their own cost and expense, to defend the Assured against such claim.

EXCLUSIONS

4. In no case shall this insurance cover
 - 4.1 loss damage or expense attributable to wilful misconduct of the Assured
 - 4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured
 - 4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance (for the purpose of these Clauses "packing" shall be deemed to include stowage in a container and "employees" shall not include independent contractors)
 - 4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured
 - 4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)
 - 4.6 loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage
This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract
 - 4.7 deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons
 - 4.8 loss damage or expense directly or indirectly caused by or arising from the use of any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.
5. In no case shall this insurance cover loss damage or expense arising from
 - 5.1.1 unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein
 - 5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out
prior to attachment of this insurance or
by the Assured or their employees and they are privy to such unfitness at the time of loading.
- 5.2 Exclusion 5.1.1 above shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.
- 5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.
6. In no case shall this insurance cover loss damage or expense caused by
 - 6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
 - 6.2 capture seizure arrest restraint or detention, and the consequences thereof or any attempt thereat
 - 6.3 derelict mines torpedoes bombs or other derelict weapons of war.
7. In no case shall this insurance cover loss damage or expense

- 7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions
- 7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions
- 7.3 caused by any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted
- 7.4 caused by any person acting from a political, ideological or religious motive.

DURATION

Transit Clause

- 8. 8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit,
continues during the ordinary course of transit
and terminates either
 - 8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance,
 - 8.1.2 on completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or
 - 8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit or
 - 8.1.4 on the expiry of 60 days after completion of discharge overseas of the subject-matter insured from the overseas vessel at the final port of discharge,
whichever shall first occur.
- 8.2 If, after discharge overseas from the overseas vessel at the final port of discharge, but prior to termination of this insurance, the subject-matter insured is to be forwarded to a destination other than that to which it is insured, this insurance, whilst remaining subject to termination as provided in Clauses 8.1.1 to 8.1.4, shall not extend beyond the time the subject-matter insured is first moved for the purpose of the commencement of transit to such other destination.
- 8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.

Termination of Contract of Carriage

- 9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before unloading of the subject-matter insured as provided for in Clause 8 above, then this insurance shall also terminate *unless prompt notice is given to the Insurers and continuation of cover is requested when this insurance shall remain in force, subject to an additional premium if required by the Insurers*, either
 - 9.1 until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur,
or
 - 9.2 if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

Change of Voyage

- 10. 10.1 Where, after attachment of this insurance, the destination is changed by the Assured, *this must be notified promptly to Insurers for rates and terms to be agreed. Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable market terms.*
- 10.2 Where the subject-matter insured commences the transit contemplated by this insurance (in accordance with Clause 8.1), but, without the knowledge of the Assured or their employees the ship sails for another destination, this insurance will nevertheless be deemed to have attached at commencement of such transit.

CLAIMS

Insurable Interest

- 11. 11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.
- 11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Insurers were not.

Forwarding Charges

- 12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the

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Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured.

This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their employees.

Constructive Total Loss

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival.

Increased Value

14. 14.1 If any Increased Value insurance is effected by the Assured on the subject-matter insured under this insurance the agreed value of the subject-matter insured shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

14.2 Where this insurance is on Increased Value the following clause shall apply:

The agreed value of the subject-matter insured shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the subject-matter insured by the Assured, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

BENEFIT OF INSURANCE

15. This insurance

15.1 covers the Assured which includes the person claiming indemnity either as the person by or on whose behalf the contract of insurance was effected or as an assignee,

15.2 shall not extend to or otherwise benefit the carrier or other bailee.

MINIMISING LOSSES

Duty of Assured

16. It is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised

and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

Waiver

17. Measures taken by the Assured or the Insurers with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

NOTE:- Where a continuation of cover is requested under Clause 9, or a change of destination is notified under Clause 10, there is an obligation to give prompt notice to the Insurers and the right to such cover is dependent upon compliance with this obligation.

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APPENDIX 7

BIMCO slow steaming and virtual arrival clauses

BIMCO slow steaming clause for time charter parties

- (a) The Charterers may at their discretion provide, in writing to the Master, instructions to reduce speed or RPM (main engine Revolutions Per Minute) and/or instructions to adjust the Vessel's speed to meet a specified time of arrival at a particular destination.
 - (i) *Slow Steaming – Where the Charterers give instructions to the Master to adjust the speed or RPM, the Master shall, subject always to the Master's obligations in respect of the safety of the Vessel, crew and cargo and the protection of the marine environment, comply with such written instructions, provided that the engine(s) continue(s) to operate above the cut-out point of the Vessel's engine(s) auxiliary blower(s) and that such instructions will not result in the Vessel's engine(s) and/or equipment operating outside the manufacturers'/designers' recommendations as published from time to time.
 - (ii) *Ultra-Slow Steaming – Where the Charterers give instructions to the Master to adjust the speed or RPM, regardless of whether this results in the engine(s) operating above or below the cut-out point of the Vessel's engine(s) auxiliary blower(s), the Master shall, subject always to the Master's obligations in respect of the safety of the Vessel, crew and cargo and the protection of the marine environment, comply with such written instructions, provided that such instructions will not result in the Vessel's engine(s) and/or equipment operating outside the manufacturers'/designers' recommendations as published from time to time. If the manufacturers'/designers' recommendations issued subsequent to the date of this Charter Party require additional physical modifications to the engine or related equipment or require the purchase of additional spares or equipment, the Master shall not be obliged to comply with these instructions.
- (b) At all speeds the Owners shall exercise due diligence to ensure that the Vessel is operated in a manner which minimises fuel consumption, always taking into account and subject to the following:
 - (i) The Owners' warranties under this Charter Party relating to the Vessel's speed and consumption;
 - (ii) The Charterers' instructions as to the Vessel's speed and/or RPM and/or specified time of arrival at a particular destination;
 - (iii) The safety of the Vessel, crew and cargo and the protection of the marine environment; and
 - (iv) The Owners' obligations under any bills of lading, waybills or other documents evidencing contracts of carriage issued by them or on their behalf.
- (c) For the purposes of Sub-clause (b), the Owners shall exercise due diligence to minimise fuel consumption:
 - (i) when planning voyages, adjusting the Vessel's trim and operating main engine(s) and auxiliary engine(s);

* Sub-clauses (a)(i) and (a)(ii) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative (a)(i) shall apply.

- (ii) by making optimal use of the Vessel's navigation equipment and any additional aids provided by the Charterers, such as weather routing, voyage optimization and performance monitoring systems; and
- (iii) by directing the Master to report any data that the Charterers may reasonably request to further improve the energy efficiency of the Vessel.
- (d) The Owners and the Charterers shall share any findings and best practices that they may have identified on potential improvements to the Vessel's energy efficiency.
- (e) **For the avoidance of doubt, where the Vessel proceeds at a reduced speed or with reduced RPM pursuant to Sub-clause (a), then provided that the Master has exercised due diligence to comply with such instructions, this shall constitute compliance with, and there shall be no breach of, any obligation requiring the Vessel to proceed with utmost and/or due despatch (or any other such similar/equivalent expression).
- (f) **The Charterers shall ensure that the terms of the bills of lading, waybills or other documents evidencing contracts of carriage issued by or on behalf of the Owners provide that compliance by Owners with this Clause does not constitute a breach of the contract of carriage. The Charterers shall indemnify the Owners against all consequences and liabilities that may arise from bills of lading, waybills or other documents evidencing contracts of carriage being issued as presented to the extent that the terms of such bills of lading, waybills or other documents evidencing contracts of carriage impose or result in breach of the Owners' obligation to proceed with due despatch or are to be held to be a deviation or the imposition of more onerous liabilities upon the Owners than those assumed by the Owners pursuant to this Clause.

23.12.11

BIMCO slow steaming clause for Voyage charter parties

- (a) The Owners shall be entitled to give instructions to the Master to reduce speed or RPM (main engine Revolutions Per Minute) provided that the Vessel's speed, basic good weather conditions, shall not fall below knots.
- (b) Where the Vessel proceeds at a reduced speed pursuant to Sub-clause (a), this shall constitute compliance with, and there shall be no breach of, any obligation requiring the Vessel to proceed with utmost and/or due despatch (or any other such similar/equivalent expression).
- (c) The Charterers shall ensure that the terms of the bills of lading, waybills or other documents evidencing contracts of carriage issued by or on behalf of the Owners provide that the exercise by Owners of their rights under this Clause does not constitute a breach of the contract of carriage. The Charterers shall indemnify the Owners against all consequences and liabilities that may arise from bills of lading, waybills or other documents evidencing contracts of carriage being issued as presented to the extent that the terms of such bills of lading, waybills or other documents evidencing contracts of carriage impose or result in the imposition of more

** Sub-clauses (e) and (f) not applicable in the liner trade.

onerous liabilities upon the Owners than those assumed by the Owners pursuant to this Clause.

- (d) This Clause shall be without prejudice to any other express or implied rights under this Charter party entitling the Vessel to proceed at speeds below the minimum speed stated in Sub-clause (a).

31.07.12

BIMCO virtual arrival clause for Voyage charter parties

- (a) Notwithstanding any other clause in this Charter party entitling the Owners to slow steam, the Charterers shall be entitled to request the Owners in writing to instruct the Master to adjust the Vessel's speed to meet a specified time of arrival at a particular destination, always subject to the Owners' consent which shall not be unreasonably withheld and, in the case of an approach voyage, subject to agreeing an amended cancelling date. The Charterers shall not be entitled to request an adjustment of speed that exceeds the Vessel's warranted speed. Any extra time used on a sea voyage as a direct consequence of the Vessel adjusting speed pursuant to the Charterers' request shall be compensated by the Charterers to the Owners at a rate equal to ____ % of the demurrage rate (if left blank then fifty per cent (50%) shall apply). Such compensation shall be payable by the Charterers to the Owners prior to completion of final discharge. The extra time used shall be agreed by the parties, failing which an independent third party (an "Expert") shall be appointed by mutual agreement. The Expert shall act as an expert and not as an arbitrator and his decision shall be final and binding upon the parties. The costs of such Expert shall be shared equally by the parties. In the absence of mutual agreement as to the identity of the Expert, each party shall appoint an independent Expert at their own expense to calculate the extra time; the average of the results of such calculations shall be binding.
- (b) Such extra time shall be calculated on the basis of all relevant information including but not limited to weather data, wave and speed projections and other relevant technical or meteorological data.
- (c) Where the Vessel proceeds at a reduced speed pursuant to Sub-clause (a), then provided that the Master has exercised due diligence to comply with such instructions, this shall constitute compliance with, and there shall be no breach of, any obligation requiring the Vessel to proceed with utmost and/or due despatch (or any other such similar/equivalent expression).
- (d) The Charterers shall ensure that the terms of the bills of lading, waybills or other documents evidencing contracts of carriage issued by or on behalf of the Owners provide that compliance by Owners with this Clause does not constitute a breach of the contract of carriage. The Charterers shall indemnify the Owners against all consequences and liabilities that may arise from bills of lading, waybills or other documents evidencing contracts of carriage being issued as presented to the extent that the terms of such bills of lading, waybills or other documents evidencing contracts of carriage impose or result in the imposition of more onerous liabilities upon the Owners than those assumed by the Owners pursuant to this Clause.

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